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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1091

MUNICIPAL DISTRIBUTOR GROUP, *Petitioner*,

v.

FEDERAL POWER COMMISSION, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MUNICIPAL DISTRIBUTOR GROUP, *Petitioner,*

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FEDERAL POWER COMMISSION, et al.[1]

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Municipal Distributor Group ("MDG")[2] petitions for a writ of certiorari to review the judgment of the United

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[1] The additional respondents are listed in Appendix D to this petition.

[2] The Municipal Distributor Group comprises Memphis Light, Gas and Water Division operating municipal gas, electric and water systems in Memphis, Tennessee, and surrounding Shelby County, Tennessee, nine other Tennessee public systems, and American Public Gas Association, having a membership of 201 public systems operating in 28 states.

States Court of Appeals for the Fifth Circuit in this case entered March 19, 1970.[3]

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit issued March 19, 1970, and the opinion of the Court of Appeals issued June 16, 1970, denying the petitions for rehearing are not yet officially reported. They are printed as Appendix A and Appendix B, respectively, to this petition. Opinion No. 546 and accompanying order of the Federal Power Commission issued September 25, 1968 is reported in 40 FPC 530. Opinion No. 546-A and accompanying order of the Federal Power Commission issued March 20, 1969 is reported in 41 FPC 301.

JURISDICTION

The judgment of the court of appeals, printed as Appendix E, was entered on March 19, 1970. The court of appeals denied the petitions for rehearing by an opinion issued June 16, 1970, printed as Appendix B. The mandate was issued July 14, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

In its supplemental opinion issued June 16, 1970, denying the petitions for rehearing, the court below ruled for the first time that the Commission, notwithstanding the court's

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[3]Following the entry of judgment on March 19, 1970, numerous petitions for rehearing were filed. On June 16, 1970, the court below entered its supplemental opinion denying the petitions for rehearing. Thereafter, on July 14, 1970, the judgment was issued as the mandate.

affirmance of the Commission's rate orders, can adjust the rate orders retroactively by reason of the provisions of Section 16 of the Natural Gas Act and the equitable powers of the court pursuant to Section 19(b) of the Natural Gas Act, which powers the court below undertook to confer upon the Commission. The questions presented by this ruling are:

1. Whether the court below correctly held that the Commission is empowered under Section 16 of the Natural Gas Act to revise retroactively the rates prescribed by the Commission's rate orders notwithstanding the court's affirmance thereof.

2. Whether the court below correctly held that through the exercise of its equitable powers it has the power to revise the rates retroactively notwithstanding affirmance of the orders and to confer the court's equitable powers upon the Commission, thereby empowering the Commission to revise the rates retroactively.

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821-833, as amended, 15 U.S.C. 717-717w are set out in Appendix C to this petition.

STATEMENT

Proceedings Before the Commission

In May 1961, the Federal Power Commission ("Commission") initiated an investigation to determine and fix the just and reasonable ceiling rates for all sales by independent producers of natural gas in interstate commerce from Southern Louisiana, including the area offshore Louisiana in the

Gulf of Mexico[4] (40 FPC 542). The Commission has described this area, particularly the offshore area, as constituting at the present time and for the foreseeable future a principal area of development of natural gas in the United States (40 FPC 542, 544-46).

The Commission initiated the investigation under Section 5(a) of the Natural Gas Act (Act)[5] and named as respondents 252 natural gas producers. The Commission also consolidated with the proceedings 199 Section 4(e)[6] proceedings involving 70 of the 252 producers (40 FPC 542). Numerous distributors of natural gas, private and public, interstate natural gas pipeline companies, state regulatory commissions, other interested parties, and the Commission's Staff participated in the proceedings.

Prehearing conferences and other meetings were held in an effort to bring the massive proceedings within manageable proportions. After these conferences and meetings had taken place, the cases-in-chief were prepared and served in advance of hearing and were placed in evidence on December 10, 1963. Rebuttal evidence was placed in evidence on March 24, 1964. Cross-examination commenced on April 23, 1964.

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[4]The Commission has defined this area to include all parts of the State of Louisiana south of the thirty-first parallel, including all areas, both State and Federal, in the Gulf of Mexico off the shore of Louisiana. (40 FPC 542)

[5]Section 5(a) clothes the Commission with the authority to initiate rate investigations on its own motion and, after hearing, to fix just and reasonable rates which are to be prospectively effective, i.e., from and after the date of issuance of the Commission's order fixing the just and reasonable rates (App. C, p. C. 3).

[6]Section 4(e) proceedings resulted from the unilateral filing of notices of rate changes by producers under Section 4(d) of the Act. When filed they are subject to suspension for a five-month period, and if the rate investigation thereby initiated is not concluded at the end of the suspension period, the increased rates may be made effective subject to refund. (App. C, pp. C. 2-3).

The hearings, with recesses, continued until the record was closed on November 5, 1965. The hearings produced a transcript of more than 34,000 pages, about 300 exhibits (most of them voluminous), and many items by reference (for the most part also voluminous).

The Presiding Examiner's decision was issued December 30, 1966 (40 FPC 703-902). After hearing oral argument *en banc*, on May 15 and 16, 1967, the Commission on September 25, 1968 issued its Opinion No. 546 and accompanying order (40 FPC 530-702).[7] After consideration of applications for rehearing and motions to reopen, the Commission on March 20, 1969 issued its supplemental Opinion No. 546-A and accompanying order (41 FPC 349). By the supplemental opinion and order, the Commission modified the original opinion and order in part, denied the motions for stay filed by many producers, and in all other respects denied the applications for rehearing.

Opinions No. 546 and 546-A and Accompanying Orders

The Commission established three vintages of natural gas and established the following as the just and reasonable ceiling rate for each vintage (40 FPC 544):[8]

[7] The decision was issued after this Court on May 1, 1968 had sustained in their entirety the rate orders issued by the Commission in its first effort to fix producer rates on an area, rather than an individual company, basis. The first proceeding involved the Permian Basin. *Area Rate Proceeding*, Docket No. AR61-1, 24 FPC 1121 (1960), affirmed, *Permian Basin Area Rate Cases*, 390 U.S. 745 (May 1, 1968).

[8] The Commission fixed January 1, 1961 as the date of division between "new gas-well gas and old gas-well gas". The latter type is also called "flowing gas" by the Commission (40 FPC 555).

Vintage	Rate	
	On-Shore	Off Shore
	(cents per Mcf)	
All casinghead or oil well[9] gas (gas produced in association with oil) and pre-1961 gas-well gas (including residue gas derived from it) [old or flowing gas-well gas]	18-1/2	17
Gas-well gas sold under contracts dated January 1, 1961 through September 30, 1968 [new gas-well gas]	19-1/2	18
Gas-well gas sold under contracts dated October 1, 1968 or later [new gas-well gas]	20	18-1/2

The difference between on-shore and off-shore prices of 1-1/2 cents per Mcf represented the Commission's allowance in on-shore gas prices for Louisiana severance tax (40 FPC 544).

All of the prices were subject to upward and downward adjustment for heating value (Btu content) and the third vintage rates were also subject to reductions in the event of deviation from specified quality standards.

The rates for second vintage gas-well gas and the even higher rates for third vintage gas were awarded to elicit supply and to encourage continuation of necessary exploration and development.

With respect to rates collected by producers under Section 4(e) of the Act, the Commission ruled that refunds would be required by further order of the Commission of

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[9]The Commission found that casinghead gas is discovered largely as a product of the search for oil and therefore exploration for it could not be encouraged by awarding such gas the higher second and third vintage rates. The Commission, for this reason, fixed the rates for casinghead gas irrespective of vintage at the first vintage rates (40 FPC 590-91).

the difference between the just and reasonable rate prescribed in Opinion No. 546 and the rate collected subject to refund (40 FPC 626). With respect to all other rates, the Commission ordered that the collection of rates in excess of the applicable area rate established in Opinion No. 546 from and after September 25, 1968, the effective date of the opinion, shall be subject to refund, plus interest at 7 percent.

The Commission ordered that these ceiling prices would be subject to change only in accordance with the procedure prescribed in Opinion No. 546. Under the procedure there prescribed, any seller seeking to charge rates in excess of the ceiling prices or requesting a change thereof must file a petition for waiver of the Commission-prescribed price and must justify fully the relief sought (40 FPC 650). Unless and until the Commission grants the petition, the seller may not file rate increases in excess of the applicable area rate prescribed in Opinion No. 546 (40 FPC 650). These rate-change provisions have been commonly described as prescribing an indefinite moratorium on rate changes.

The ceiling prices prescribed by the Commission were based on a 12 percent overall rate of return on rate base, which on a capital structure consisting of 85 percent common stock equity capital and 15 percent debt capital at an average cost of 4.5 percent, yielded approximately 13.3 percent return on common stock equity (40 FPC 579, 601).

After consideration of applications for rehearing, the Commission on March 20, 1969 issued its Opinion No. 546-A and accompanying order modifying in part and confirming in part Opinion No. 546 and order.

The Commission re-affirmed that the rates established in Opinion No. 546 were just and reasonable. The Commission, however, while re-affirming that 18.5 cents per Mcf was the just and reasonable rate for offshore third vintage gas, exempted such gas from the rate change procedure prescribed by the Commission and authorized producers of such gas to file for contractually authorized increases up to

20 cents per Mcf, subject to suspension and possible refund (41 FPC 306-07). The Commission also limited the application of the rate change procedures for third vintage onshore gas sales to a five year period ending January 1, 1974 (41 FPC 308-09).

Proceedings Before the Court Below

Petitions for review were filed in several courts of appeals within minutes of each other after public issuance by the Commission of its Opinion No. 546-A and order. The filing of a petition in the court below being first in time, review jurisdiction vested in that court. Petitions for review filed by producers and pipeline companies challenged the prescribed rates as too low and petitions for review filed by consumer representatives challenged them as too high.

By order of May 13, 1969, the court below granted a stay until hearing on the merits in June 1969, with this stay to expire no later than July 1, 1969. Thereafter, upon numerous producer requests for a later hearing, a conference was convened by the court below to consider these requests. As a consequence, the oral argument was postponed until October 6, 1969 and the Commission, at the court's request, stayed the ordered rate reductions (but no other aspects of its order) until October 13, 1969. The oral argument was held on October 6, 1969, before a panel of the court below which subsequently, by order issued October 17, 1969, vacated the submission of the cause to that panel and reassigned the case for argument and determination before an entirely new panel of judges of the same court. The stay of the Commission's orders was continued. The new panel heard oral argument on December 17, 1969.

Thereafter, on March 19, 1970, the court below, although expressing concern with respect to some aspects of the Commission's orders, sustained the Commission's orders in full, stating (App. A, pp. A. 69-70):

The orders of the Commission are sustained in full. The mandate of this Court should not, however, be interpreted to interfere with Commission action that would change the rates we have approved here. We specifically and emphatically reject the contention advanced by the MGD (SIC: MDG) that the Commission has no power to set aside rates once determined by it to be just and reasonable when it has reason to believe its determinations may have been erroneous.[124(10)] In fact, the existence of the new proceedings, which as we understand them will take into account many of the issues whose absence has concerned us here, has been one of the factors we have considered in deciding to affirm the Commission's decisions.[11]

[124] Section 16 of the Natural Gas Act, 15 U.S.C. § 717o (1963), gives the Commission power to "perform any and all acts, and to prescribe, issue, make, amend, *and rescind* such orders as it may find necessary or appropriate to carry out the provisions of this chapter." (emphasis and footnotes in parenthesis added)

[10] MDG made no such absurd contention. MDG challenged as unlawful the exemption in Opinion No. 546-A of third vintage offshore gas from the rate-change procedures prescribed in Opinion No. 546 and the limitation of the applicability of the rate-change procedures to third vintage onshore gas to only 5 years, because these actions were not based on evidence, on statutory authority, and were arbitrary and capricious. *Brief of MDG in court below, pp. 34-41.*

[11] The court's reference to a new proceeding is to a second round of area rate proceedings initiated by the Commission at Docket No. AR69-1 to review the rates prescribed in this proceeding and, if necessary, to prescribe new rates (41 FPC 306; Area Rate Proceeding, Docket No. AR69-1, order issued March 20, 1969 instituting investigation and order issued December 15, 1969 enlarging investigation). In the new area rate proceeding which is now in progress before a Presiding Examiner, any new rates would be effective from and after the date of issuance of a new order prescribing rates, consistent with the Commission's authority to fix rates only prospectively. Sections 4(e) and 5(a). *Hope Natural Gas Co. v. FPC*, 196 F.2d 803, 805 (CA 4, 1952).

Petitions for rehearing were filed by the producer and pipeline petitioners. These petitioners, *inter alia*, agreed that the Commission, notwithstanding affirmance, may modify its orders for the future and the rates to be charged prospectively, but expressed grave doubts that the Commission could revise the rates prescribed in Opinion No. 546, as modified by Opinion No. 546-A, retroactively. Producer and pipeline petitions for rehearing, therefore, urged the court below, as a means of preserving the Commission's authority to revise the rates retroactively, to grant rehearing, and upon such rehearing, to either instruct "the Commission to make further findings on issues deemed deficient by the Court" or to "grant the Motion for Leave to Adduce Additional Evidence heretofore filed" (e.g., Petition for Rehearing of Humble Oil & Refining Company and Humble Gas Transmission Company, pp. 3, 9; Amerada Hess, et al., pp. 2-3, 9-10).

On May 11, 1970, the court below directed the Commission and other parties to the review proceedings to respond to two questions:

> (1) Whether the Federal Power Commission has authority to stay, modify, or rescind an order once that order has been affirmed by this Court, if circumstances appearing since the entry of the order seem to make these actions advisable.
>
> (2) Whether this Court may, in the exercise of its equitable powers, affirm an order of the Commission while preserving the authority of the Federal Power Commission to stay, modify, or rescind the order if the circumstances seem to make these actions advisable.

Responses were filed by MDG, the New York Public Service Commission, Associated Gas Distributors (a group of private distributors of natural gas), and the Commission.

The Commission unequivocally advised the court below in response to Question No. 1 that the Commission "has no authority to prescribe or permit retroactive rate changes", and has authority to modify, rescind, or set aside a rate order or moratorium affirmed by a court "*only prospectively* from the date of a subsequent Commission order" (emphasis the Commission's). The Commission stated that it is "also clear that Courts have no authority to order reparations under the Gas and Power Acts". (Commission Response, pp. 2-3). "Therefore", the Commission concluded, "prospective changes in rates—increases or decreases—are the method by which the Commission adjusts for circumstances appearing since the entry of an order, unless the reviewing Court otherwise directs" (id., p. 3).

With respect to the second question, the Commission stated that the extent of the Court's equitable powers under Section 19(b) of the Act "apparently has not been decided". Referring to the powers conferred upon the court by Section 19(b), to instruct the Commission to reconsider the record under standards set by the court, or to reopen the record for specific purposes and to submit any modification of the rate order for further review, without necessarily reversing and vacating the order, the Commission concluded that any "equitable powers which would transcend these statutory powers would be determined by this Honorable Court." (Ibid., p. 4).

Commenting on the petitions for rehearing, the Commission said (Ibid., pp. 4-5):

> Comment on the petitions for rehearing will be limited to one point. The petitions reflect doubt, disagreement and controversy over whether this Court intended to authorize this Commission to make retrospective adjustments, if it deemed appropriate, in the rates set in Opinion 546 and 546-A *as of the effective date of the Commission opinions* (October, 1968) to the present or whether the Court intended, by use of the words 'sustained in full' (slip op. pp. 2, 69), to restrict the Commission to

> prospective changes from some future date when subsequent Commission orders, if any, are issued lifting the moratoria or establishing a new just and reasonable rate. (emphasis the Commission's)

Concluding its response, the Commission, over the vigorous dissent of Commissioner O'Connor, in which Chairman Nassikas joined, by a 3 to 2 vote, requested a remand in "order that the Commission can discharge its regulatory responsibilities consistent with the Court's opinion" (Ibid., p. 5).

MDG responded to both questions in the negative and opposed the request for remand, as did the Associated Gas Distributors and New York Public Service Commission.

In the meantime, the Commission's orders on review continued to be stayed. Finally, on June 16, 1970, the petitions for rehearing were denied in a per curiam opinion. The court below stated (App. B, pp. B. 2-3):

> . . . We wish to make crystal clear the authority of the Commission in this case to reopen any part of its order that circumstances require be reopened. Under section 19(b) of the Natural Gas Act, this Court has the broad remedial powers that inhere in a court of equity, and pursuant to our equitable powers we make it part of the remedy in this case that the authority of the Commission to reopen any part of its orders, including those affecting revenues from gas already delivered, is left intact. The Commission can make retrospective as well as prospective adjustments in this case if it finds that it is in the public interest to do so.
>
> At the same time, we emphasize that our judgment is an affirmance and not a remand. The appropriate place for originally considering what parts of the orders must be reopened in light of new evidence is before the Commission. It may be that the Commission will decide that the refunds it has ordered are just and reasonable or at least that their significance to the public interest is outweighed by

> the confusion and delay that would result from their reopening. In this event, the Commission will allow its refund orders to stand as they are. Or it may be that the refunds are too burdensome in light of new evidence to be in the public interest. In that case, it is our judgment that the Commission shall have the power and the duty to remedy the situation by changing its orders.
>
> In all other respects, the original opinion of this Court is the final disposition of this appeal.

Subsequently, the court below denied producer applications for stay of the mandate, but on July 2, 1970, acting on its own motion, and without notice, the Commission entered an order continuing the stay of Opinions No. 546 and 546-A and accompanying orders.[12]

On July 2, 1970, certain producers, based on the decision of June 16, 1970 of the court below, filed a motion for continuation of the stay and for reopening of the proceedings and consolidation thereof with the new, second round of Southern Louisiana area rate proceedings at Docket No. AR69-1 and for retroactive reconsideration of the rate levels and refund requirements of the orders affirmed by the court below. Pending also before the Commission are petitions by two producers for exemption from the refund requirements of the orders.

REASONS FOR GRANTING THE WRIT

The questions presented by the June 16, 1970 ruling of the court below are of substantial importance in the administration of the Commission's rate-making responsibilities

[12] MDG has filed an application for rehearing of the Commission's July 2 order continuing the stay on the ground that the order is beyond the Commission's power.

under the Natural Gas Act and under the Federal Power Act.[13] The ruling of the court below is in conflict with a consistent line of decisions of this Court regarding the rate-making powers of the Commission.

This proceeding involves huge sums unlawfully exacted from consumers that the producers under the ruling of the court below would retain despite the clear requirement of the Gas Act that the excessive charges are the rightful property of the consumers for whose protection the Gas Act was passed.[14] Additionally, there is at stake the preservation of the regulatory scheme enacted by Congress, "so framed as to afford consumers a complete, permanent, and effective bond of protection from excessive rates and charges". *Atlantic Refining v. Public Service Commission*, 360 U.S. 378, 388 (1959).

Under the Commission's opinions and orders in this case, the just and reasonable rates prescribed by the Commission, which have been sustained in full by the court below, are effective as of September 25, 1968. These just and reasonable rates have never been permitted to become effective. During the entire period of court litigation the rates were stayed and following issuance of the mandate and dissolution of the stay, the Commission, on its own motion, on

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[13] The Natural Gas and Power Acts are companion statutes. Under the former the Commission regulates sales at wholesale and transportation of natural gas in interstate commerce, and under the latter the Commission regulates interstate transactions of electric utilities. Cases interpreting the Gas Act have been cited in cases interpreting the Power Act and vice versa. Both acts "grew out of the same judicial history". *FPC v. Southern Cal. Edison Co.*, 376 U.S.205, 211-14 (1964).

[14] *FPC v. Hope Natural Gas Co.*, 320 U.S.591, 610 (1944); *FPC v. Tennessee Gas Transmission Co.*, 371 U.S. 145, 154 (1962); *Atlantic Refining Co. v. Public Service Comm'n*, 360 U.S. 378, 388, 389 (1959); *FPC v. Interstate Gas Co.*, 336 U.S. 577, 581 (1949).

July 2, 1970, stayed the effectiveness of the rates.[15] As a consequence, the consumers have yet to realize the rate reductions ordered by the Commission and to receive the refunds required by the Commission's orders. In fact, a veritable avalanche of rate increases filed by the pipeline companies since the Commission's orders were issued in this case reflect, in substantial part, in the pipeline companies' cost of gas purchased the level of producer rates declared unlawful by the Commission.

Since September 25, 1968, consumers have paid enormous amounts of money in excess of the just and reasonable rate levels that are required to be refunded. The ruling of the court below has placed in jeopardy consumer funds totalling at the present time a minimum of $340,000,000.[16] Producers have filed applications with the Commission for retroactive modifications of the rates prescribed, based on the ruling of the court below, which would deny the reductions and refunds to the consumers.

If the ruling of the court below stands, bestowing retroactive rate-making power on the Commission, the "complete, permanent, and effective bond of protection from excessive rates and charges" intended by Congress will have no viable existence. There will no longer be protection of refunds, no finality of decision as to the past, no certainty,

[15] The issuance of the Commission stay, after affirmance, has been separately challenged by MDG by petition for rehearing to the Commission as beyond the Commission's power and as violative of the requirements for stay.

[16] In a petition for rehearing filed in the court below by Humble Oil & Refining Company and six other major producers at page 6 of the petition, the reductions and refunds were estimated to be $170,000,000 per year based on 1966 sales volumes. Two years have passed since the effective date of the Commission's order so that the accumulated reductions and refunds are at least $340,000,000. They are undoubtedly much larger since gas use has risen dramatically after 1966 by reason of demands for gas generated by environmental considerations, such as pollution abatement by firing industrial boilers with gas in lieu of oil or coal.

and there may be financial jeopardy for distributors of natural gas, private and public.

Consider the consequences on distributors of retroactive rate increases. If retroactive increases were to be granted the producers, the Commission would be impelled to grant retroactive increases to the pipeline companies to protect their financial integrity. But the Commission could do nothing for the distributors who could not through state regulatory action secure retroactive rate increases. The result would be financial disaster for distributors.

1. The decision of the court below is in conflict with the decisions of this Court and of circuit courts of appeals that have considered the issue. The Commission's rate-making powers are prospective only. It has neither retroactive rate-making nor reparations powers.

The rate-making powers of the Commission are found in Sections 4 and 5 of the Act. The gas operator may, unless otherwise bound by contract or precluded by lawful Commission regulations, file changes in rates with the Commission under Section 4(d) of the Act which may be made effective within 30 days after filing, subject to the five-month suspension provision of Section 4(e). If suspended, the increased rates may be made effective at the end of the suspension period in the event the Commission's investigation into the lawfulness of the increased rate has not been concluded, subject to the posting of a bond to refund the portion of the increased rates or charges found not justified. *Section 4(e).* "This not only gives the natural gas company opportunity to increase its rates where justified, but likewise guarantees that the consumer may recover refunds for moneys paid under excessive increases". *Atlantic Refining v. Public Service Comm'n,* 360 U.S. at 389. At the conclusion of the investigation "the Commission may make such orders with reference thereto as would be proper in a proceeding initiated" under Section 5(a) "after it had become effective", Section 4(e): *Hope Natural Gas Co. v. FPC,* 196 F.2d 803, 805 (CA 4, 1952).

"The overriding intent of the Congress to give full protective coverage to the consumer as to price is further emphasized in § 5 of the Act, 15 U.S.C. § 717d, which authorizes the Commission *sua sponte*, or otherwise to institute an investigation into existing rates and charges and to fix them at a just and reasonable level" which "rate found by the Commission to be just and reasonable becomes effective prospectively only". *Atlantic Refining*, 360 U.S. at 389.

This Court has unequivocally declared that the Commission has no retroactive rate-making powers and that neither the Commission nor the court has the power to award reparations. *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 618 (1944); *Montana-Dakota Util. Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 254 (1951), and see 341 U.S. at 258 for concurrence of the dissenting opinion on this point; *FPC v. Sunray DX Oil Co.* 391 U.S. 9, 24 (1968). To the same effect are decisions of the circuit courts of appeals. *State Corporation Commission of Kansas v. FPC*, 215 F.2d 176, 183 (CA 8, 1954); *Hope Natural Gas Co. v. FPC*, 196 F.2d 803, 805 (CA 4, 1952).

In *FPC v. Hope Natural Gas Co.*, 320 U.S. at 618, this Court said:

> It is conceded that under the Act the Commission has no power to make reparation orders. And its power to fix rates admittedly is limited to those 'to be thereafter observed and in force.'

In *Montana-Dakota, supra*, the court was unanimous on the point that the Commission has no power to grant reparations and that the Commission's rate-making authority was only to grant prospective rate relief. (Cf. 341 U.S. at 254 and 258). On these points as to which there was no dissent, the dissenting opinion said (341 U.S. at 257-58):

> We face at the outset the contention that this section confers on the Federal Power Commission authority to award reparations for unreasonable rates collected in the past. Federal railroad rate legislation gave such a power to the Interstate Commerce

> Commission. . . . But it was not given to the Federal Power Commission. It was withheld deliberately. See S.Rep. No. 621, 74th Cong. 1st Sess. 20. Wholesale consumers of electric energy were apparently considered, as a rule, adequately protected by the provisions of the Act authorizing the Commission to grant prospective relief and, in certain circumstances, to order refunding of sums accumulated during the pendency of rate proceedings. . . . Despite the unqualified statutory declaration that unreasonable rates are unlawful, we think it clear that Congress did not intend either the court or Commission to have the power to award reparations on the ground that a properly filed rate or charge has in fact been unreasonably high or low. . . .[17]

In *State Corporation Commission of Kansas, supra,* the Eighth Circuit held that (215 F.2d at 183, 184):

> Under Section 4(e) the Commission may order a refund with interest of rates or charges which it has decided not to be justified but its power to fix rates is prospective only and those it fixes are applicable to the future.
>
> * * *
>
> . . . The Commission's legislative fixing of rates must necessarily relate to the future and the Commission lacks power to grant reparation where a rate has proved on application to be confiscatory.

The reliance of the court below on Section 16 is misplaced. Although Section 16 may support "a generous construction of" the Commission's "statutory authority" (*Permian Basin Area Rate Cases,* 390 U.S. 747, 776 (1968)), the broad grant of authority of Section 16 "to perform any and all acts, and to prescribe, issue, make, amend and rescind such orders, rules, and regulations as it may find necessary or appropriate," cannot be exercised, nor construed, in

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[17] Although the Court was discussing the rate-making provisions of the Power Act, the decision applies with equal force to the virtually identical rate-making provisions of the Gas Act. *Supra,* footnote 13.

derogation of any of the more specific mandates or prohibitions of the Act or its purposes. Indeed, this broad grant of authority is by the terms of Section 16 expressly conferred "to carry out the provisions of this act"; not to act in derogation of the provisions or to contravene them.

2. The court below also erroneously ruled that the Commission has power to rescind retroactively a court affirmed rate order. The pertinent review provisions, Section 19(b), are as follows:

> Upon the filing of such petition (for review) such court (of appeals) shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify or set aside such order in whole or in part.
>
> * * *
>
> The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari . . . (material in parenthesis supplied)

Under these provisions, the Commission's power to revise an order remains with the Commission only until such time as the record on review has been filed with the court of appeals. *Pan American Petroleum Corporation v. FPC*, 322 F.2d 999, 1004 (CADC, 1963). Thereafter, when affirmed on appeal, the Commission has no authority to modify the order. *Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958); *State Corporation Commission of Kansas v. FPC*, *supra*, 215 F.2d at 184. When the order is affirmed, the judgment of the court of appeals is final subject only to review by this Court upon certiorari or certification. See also: *International Union v. Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 339, 340 (1945). This is not to say, however, that the Commission may not, as it has at Docket No. AR69-1, commence new proceedings to consider whether changes in circumstances since issuance of the orders in this case in the Southern Louisiana Area warrant prospective re-

vision of the prescribed rates. Cf. *FPC v. Amerada Petroleum Corp.*, 379 U.S. 687, 690 (1965). But the authorities disclose that once a decision has been made and affirmed by a court, the case should not be subject to relitigation of the same issues. This Court said in *International Union, supra*, at 340-41:

> Finality to litigation is an end to be desired as well in proceedings to which an administrative body is a party as in exclusively private litigation. The party adverse to the administrative body is entitled to rely on the conclusiveness of a decree entered by a court to the same extent that other litigants may rely on judgments for or against them.
>
> * * *
>
> Administrative flexibility and judicial certainty are not contradictory; there must be an end to disputes which arise between administrative bodies and those over whom they have jurisdiction. This does not mean that the Board could not frame an order which by its terms required modification should conditions change. . . .

3. Clearly erroneous, also, is the ruling of the court below that it has equitable powers, notwithstanding affirmance of the orders, to revise the rates and provisions of the rate orders retroactively, and that it may confer, and has conferred, its equitable power on the Commission so that the "Commission can make retrospective as well as prospective adjustments in this case if it finds that it is in the public interest to do so." (App. B, p. B. 2).

Whatever the lower court's undefined equitable powers may be, they cannot be used to confer upon the Commission broader powers than Congress conferred, *Public Service Comm'n of New York v. FPC*, 257 F.2d 717, 722 (C.A. 3, 1958).

> The jurisdiction of the FPC is entirely statutory. It acts as an arm of Congress and only as Congress has directed it.

This Court has ruled that powers withheld from the Commission by Congress cannot be conferred by the courts in

the exercise of their equitable powers. *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 254 (1951). And the Eighth Circuit has reached the same conclusion, upon consideration of Section 19(b), in *State Corporation Commission of Kansas, supra*, at 184:

> It is pointed out that in rate regulation such as is here involved the Commission's legislative fixing of rates must necessarily relate to the future and the Commission lacks the power to grant reparation where a rate has proved on application to be confiscatory. The court is also limited strictly to the exercise of judicial power and has no power to fix rates or to accord reparations on account of insufficiency of rates in the past. . . . There is no place in the proceeding for either the Commission or the court to accord reparation.
>
> * * *
>
> We conclude . . . That such recovery of reparation is not sanctioned by Section 19(b) and is contrary to well settled law.

See also: *FTC v. Raladam Co.*, 283 U.S. 643, 649 (1931): "If broader powers be desirable, they must be conferred by Congress. They cannot be merely assumed by administrative officers; *nor can they be created by the courts in the proper exercise of their judicial functions.*" (emphasis supplied)

Finally, the ruling of the court below goes beyond its powers as conferred by Section 19(b): the court may require the Commission to take additional evidence, if application therefor is made by a party to the review proceedings and may affirm, modify, or set aside the orders on review in whole or in part. The court below denied the producer-petitioners' motions for leave to adduce additional evidence and affirmed the orders. The court emphasized that its "judgment is an affirmance and not a remand." (App. B, p. B. 2). In these circumstances, there is no occasion and no basis for the exercise of the court's equitable powers. Indeed, there are no funds for disposition within

the court's jurisdiction to which its equitable powers might apply. *FPC v. Interstate Gas Co.*, 336 U.S. 577, 582-83 (1949).

CONCLUSION

This petition for a writ of certiorari should be granted and the judgment of the court below on the questions presented should be reversed without further briefs or argument since the decision of the court below on these questions is so clearly contrary to, and in conflict with, the Natural Gas Act and decisions of this Court and circuit courts of appeals.

Respectfully submitted,

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APPENDIX A
IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 27492, et al

SOUTHERN LOUISIANA AREA RATE CASES

AUSTRAL OIL CO., ET AL,

Petitioners,

versus

FEDERAL POWER COMMISSION,

Respondent.

Petition for Review of Orders of the Federal Power Commission (Texas Case)

(March 19, 1970)

Before THORNBERRY, COLEMAN and MORGAN, Circuit Judges.

THORNBERRY, Circuit Judge: This is a proceeding to review orders of the Federal Power Commission setting maximum rates for wellhead sales of natural gas produced in the Southern Louisiana area. Thirty-seven producer petitioners challenge the rates as too low.[1] Eight pipeline companies are also involved in

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[1]In discussing the issues in this case, we have usually simplified the positions of the parties by considering them as producers, consumers, and the Commission. Our review of the case, however, has taken into account subtler differences among the

the proceedings, and they concur with the producers that the rates are too low.[2] On the other hand, certain consumer interests have intervened and attack the rates as too high.[3] The Federal Power Commission presents a third position by arguing that its orders should be sustained in full.[4] The result of this trichotomy of conflicting positions — producers, consumers, and the Commission — is a case as complex as it is important.

We have determined that the orders of the Commission should be sustained in full. We add, however, that

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parties. Most of the producers, for example, have joined a single group, the Amerada group, in briefing their argument, but others have chosen to present their arguments separately. Particularly conspicuous among these separate petitioners are several small producers, and we have treated their special arguments herein. The method of presentation is a question for the parties themselves. We think, however, after considering this case, that it is to the great advantage of the parties in a complex, multi-party case to aggregate their arguments in so far as possible.

[2]The pipelines purchase gas from the producers, and it seems anomalous at the outset that they are arguing that prices are too low. The Commission found that the inelasticity of market demand for gas at the consumer level "tends to make price a second level consideration" to pipelines. 4 Joint Appendix, pt. 1, at 533d (Commission's opinion). Pipelines sometimes own production factors as well. A significant reason for the pipelines' alignment here, however, may be simply that they are concerned that the price level will not elicit sufficient supply for their needs. At oral argument, they represented that informal rationing procedures among pipeline purchasers were now in effect and that formal agreements might be necessary in the future.

[3]These parties include the New York Public Service Commission and the Municipal Distributors Group, a group of municipally owned gas distribution systems.

[4]It is supported in this position by the Associated Distributors Group (ADG) of intervenors, a group of privately owned local utility companies.

this affirmance does not reflect full satisfaction with the performance that the Commission has turned in, but rather a recognition that the process of producer regulation is a difficult one that the Commission must have latitude to adapt to changing conditions. In the section of this opinion that immediately follows, we describe this process, together with the legal events that have led to its development, and set out the Commission's actions in the cases before us. In a second section, we deal with the consumer arguments that the rates are too high. The third section takes up the producer arguments that the rates are too low. Herein, we discuss what we believe is the most serious problem presented by these cases: The possibility that the Commission has not adequately considered the problem of new gas supply in relation to demand. There is evidence of a serious supply deficiency. Fourthly, we summarize our conclusions and indicate improvements that should be expected in the regulatory process. In this final section, we also consider the stay that has prevented the Commission's orders from going into effect through this stage of review.

I. THE PROCESS OF AREA REGULATION AND THE COMMISSION'S OPINIONS

The beginnings of producer area regulation were inauspicious. Ever since the enactment of the Natural Gas Act in 1938,[5] the FPC has had the responsibility of regulating sales by interstate pipeline companies, but it was not until 1954 that the Supreme Court held in *Phillips Petroleum Co. v. Wisconsin*,[6] that the Act also

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[5] 15 U.S.C. § 717 *et seq.* (1963); 52 Stat. 821 (1938).
[6] 347 U.S. 672, 74 S.Ct. 794, 98 L.Ed. 1035.

gave the Commission power to regulate sales by independent producers at the wellhead. The Commission was convinced that producer regulation would be impractical and consequently was reluctant to assume its new role.[7] Congress was willing to amend the Act to exclude producers. But the aftermath of the *Phillips* decision, as one commentator has described it, included an accident of history that left the Commission still faced with its difficult new duty:[8]

> Congress immediately responded [to *Phillips*] by passing an act declaring that the 1956 Congress did intend complete exclusion of independent producers, and suggesting rather strongly that the 1938 Congress probably did so as well. Whereupon the President, who strongly supported the 1956 act, vetoed it for reasons unrelated to the merits of the arguments of either the Court or Congress. It has taken the eight years since 1954 for the industry and the FPC to realize that they must mount this unbroken nightmare born of stalemate out of avarice and ride it if they are to move at all.
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> The Commission was as hopeful after 1954 that this new-found, unwanted jurisdiction would vanish as it had once been fearful of

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[7] *See* F.P.C. Ann. Rep. 176-77 (1955); 36 F.P.C. Ann. Rep. 10 (1956); 37 F.P.C. Ann. Rep. 17-18 (1957); 39 F.P.C. Ann. Rep. 12-13 (1959).

[8] Johnson, *Producer Rate Regulation in Natural Gas Certification Proceedings: CATCO in Context*, 62 Colum. L. Rev. 773, 783 (1962); *see also* M. Merrill, The Public's Concern with the Fuel Minerals 104, (1960).

its coming. The record it has amassed that such regulation will not be successful is formidable.

Both economists and lawyers have questioned the soundness of direct producer price regulation,[9] but there is also support for the need for producer regulation of some type[10] and, whatever its merits, the law

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[9] *See, e.g.*, M. Adelman, The Supply and Price of Natural Gas 39 (1962); P. McAvoy, Price Formation in Natural Gas Fields 265 (1962); E. Neuner, The Natural Gas Industry 280-90 (1960) (recommending that contracting behavior rather than price be regulated, in light of a conclusion that industry structure, at least, is competitive); Cram, *Introduction to the Problem of Developing Adequate Supplies of Natural Gas*, in Economics of the Gas Industry 24 (Southwestern Legal Foundation ed. 1962); Kail, The Evolution of Area Gas Pricing and Its Effects on the Natural Gas Industry 18-22, January, 1968 (unpublished thesis in University of Texas Library); Kitch, *Regulation of the Field Market for Natural Gas by the Federal Power Commission*, 11 J. Law & Econ. 243 (1968); *cf* Kitch, *The Permian Basin Area Rate Cases and the Regulatory Determination of Price*, 116 U. Pa. L. Rev. 191, 194-99 (1967) (concluding that area rate regulation resembles wartime price control).

These and other authorities, however, are relevant only to the quasi-legislative function of the Commission in deciding how producers are to be regulated. The decisions of the Supreme Court definitely indicate that the Commission has a responsibility to take the steps necessary to assure that wellhead prices are in the public interest. The Commission does not have to employ the area rate method, or for that matter regulate price directly at all, but it has chosen to fulfill its duty in that manner here.

[10] The Commission concluded that there was an absence of effective competition in wellhead sales. This absence seems to be strongly evidenced by a rapid spiral of price increases over the years from 1950 to 1958, when the price went from less than 9 cents per Mcf to a peak of 24.05 cents. This spiral was apparently caused by three factors. First, the contracting practice in the industry resulted in oligopolistic behavior, because devices such as favored nation, periodic escalation, redetermination, and renegotiation clauses caused any price above in-line levels

since 1954 has imposed the duty of regulation upon the FPC.

From 1954 to 1960, the Commission attempted to discharge its new responsibility in the same way that it regulates pipelines, on a company-by-company basis, setting the rates of each producer according to his costs of service. This method, however, required the Commission to repeat lengthy hearing procedures for each independent operator in the nation. It consequently led to a breakdown in the administrative process,[11] a result that is easy to understand in view of the cumbersome nature even of the single consolidated cases with which we are faced here. The Commission gravitated toward lax approval of price increases. But in 1960, the

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to trigger other price rises. (These contract terms are defined in the Supreme Court's *Permian* opinion, 390 U.S. at 765, 88 S. Ct. at 1358, n. 46.) Second, the producers were able to assert market power even though the market for sales to large pipelines appears at first glance to be oligopolistic, because the pipelines typically needed large blocks of reserves at times not of their own choosing. Finally, the bargaining motivation of pipelines themselves was diluted because pipelines resold in a relatively inelastic market and hence could pass price increases on to consumers. The Commission chose to believe this evidence rather than to focus on concentration ratios, leadership turnovers, or conditions of entry, and it appears to have been justified in so doing. 4 Joint Appendix at 530d-34d (Commission's Opinion).

At the same time, there seems to be general agreement that the market is at least structurally competitive. The Supreme Court in *Permian* described producers as "intensively competitive." 390 U.S. at 757, 88 S. Ct. at 1354. See also P. McAvoy, *supra* note 9, at 7; E. Neuner, *supra* note 9, at 178-204, 280-281; M. Adelman, The Supply and Price of Natural Gas 39 (1962).

[11] *See* J. Landis, Report on Regulatory Agencies to the President-Elect 54 (printed for the use of the Senate Comm. on the Judiciary, 86th Cong., 2d Sess., 1960).

Supreme Court's *CATCO*[12] decision reversed an FPC certification order and directed the Commission to take steps to keep prices "in line." The Commission temporarily responded to this mandate by the "in-line" pricing policy, which stated that the Commission would not approve new certificates providing for gas sales at prices higher than the prevailing rate in the area, and by the "guideline" doctrine, which gave notice that the Commission would not give advance approval to price increases above certain area maxima.[13] Price increases above these guidelines thus subjected the producers to the possibility of refund obligations.

Also in 1960, the Commission began work on a more thorough solution to the problem with the first area rate proceeding, which covered the Permian Basin area of New Mexico and the Texas Panhandle. In subsequent years, the Commission simultaneously had examiners hold hearings on four other areas, of which the area involved in the instant case was one.

A. *The Permian Basin Area Rate Cases*

In *Permian*,[14] the first area rate case, the FPC set

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[12] *Atlantic Ref'g Co. v. FPC*, 1959, 360 U.S. 378, 79 S. Ct. 1246, 3 L.Ed.2d 1312 (known as the *CATCO* case). The Court urged the Commission to disallow or condition new certifications "where the proposed price is not in keeping with the public interest because it is out of line or ... might result in a triggering of general price rises or an increase in the applicant's existing rates ...."

[13] These matters were set out in the FPC's *Statement of General Policy* No. 61-1, 1960, 24 F.P.C. 818.

[14] *Permian Basin Area Rate Proceeding*, 1965, 34 F.P.C. 159, *affirmed in part and reversed in part sub. nom. Skelly Oil Co. v. FPC*, 10th Cir. 1967, 375 F.2d 6, *affirmed in full, in re Permian Basin Area Rate Cases*, 1968, 390 U.S. 747, 88 S. Ct. 1344, 20 L.Ed.2d 312.

maximum and minimum rates for an entire gas producing area on an industrywide basis. It did so by examining costs and setting a rate of return for the area's gas producing industry as a whole. It engaged in a degree of economic experimentation by creating a double-tiered pricing arrangement: The maximum price for "new" gas, gas not yet under contract of interstate sale by the cutoff date of January 1, 1961,[15] was set higher than that for "old" gas in order to stimulate exploration.[16] Old gas was priced on a cost-recovery basis on the theory that a price incentive would not encourage development of gas that had already been sold. Having set these maxima, the Commission froze them for two-and-one-half years by imposing a moratorium on price increases in excess of the ceilings as set. It stated that extraordinary circumstances would induce it to allow petitions for relief from the ceilings

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[15]This date was chosen for three reasons. First, it was the most convenient date following 1960, the year of most data for old gas. Secondly, the in-line and guideline policies had been established in 1960. Thirdly, this date reflected the Commission's estimate of the time at which the industry acquired the capability to drill "directionally," i.e., to explore specifically for gas rather than finding gas as a by-product of the search for oil. 34 F.P.C. at 189. This directionality hypothesis is a major basis of area rate regulation as the Commission has implemented it, because multi-price regulation depends upon the function of greater prices to elicit gas exploration. The hypothesis is not without its critics. *See Foster Associates Report*, December 18, 1969, at 9-10.

[16]The new gas ceiling was 16.5 cents per thousand cubic feet (Mcf) in Texas or 15.5 cents per Mcf in New Mexico, and the old gas ceiling was 14.5 cents per Mcf in Texas or 13.5 cents per Mcf in New Mexico. The difference reflected the fact that the Texas price included state taxes while the New Mexico price did not. Casinghead gas was priced at old gas ceilings irrespective of its vintage. The Commission also set a minimum price of 9 cents per Mcf.

but made it clear that the moratorium would not be lightly disregarded.

The Commission's decision was appealed to the Tenth Circuit. That court sustained the Commission's power to regulate producers by setting industrywide rates and imposing moratoriums on increases, but remanded the case to the Commission because it found that the Commission had failed to include required findings as to the consequences of its order on the gas industry or to specify with sufficient exactness the circumstances under which special relief from maximum rates would be granted. The Tenth Circuit's decision, in turn, was reviewed by the Supreme Court, which reversed the Circuit and affirmed the Commission in full. The Supreme Court's *Permian* opinion is thus the star by which we must do most of our steering in this case.

In *Permian*, the Supreme Court made several different types of determinations. First, it concluded that the Commission had the authority, under the Constitution and Natural Gas Act, to set industrywide rates and to impose ancillary regulations, such as moratoriums, necessary to make area proceedings work. Secondly, it sustained the Commission's use of the cost method for pricing, its determination of rate of return, and its double rate structure; or, in other words, it approved the components of the rates as set. Thirdly, it approved the overall effect of the rates, holding that Commission findings supported by substantial evidence indicated that the rates would produce adequate aggregate revenue, would generate sufficient growth, and would not create unjust results on individual producers. This approval of "overall effect" findings reflects a

somewhat charitable interpretation of the Commission's work,[17] one that the Court emphasized was warranted because the Commission was at an experimental stage in a new and difficult undertaking. At the same time, the Court apparently agreed with the Tenth Circuit that the paucity of findings as to the consequences of the order was a major deficiency, because it stated that it expected the Commission to do better in future proceedings.

The *Permian* decision thus indicates that a reviewing court must look to both individual components and overall effect of rates set by the Commission, but that the Commission has broad discretion that is not to be ineffectuated by either theoretical disagreement with its methods or by discovery of inadequacies that are caused mainly by the difficulty of the regulatory undertaking. The Commission is to be affirmed if it has followed the correct legal standards and acted on the basis of substantial evidence, and under any fair interpretation of *Permian* it appears that the legal standards themselves are to be construed liberally when applied to a regulatory effort still in the experimental stage. This "experiment" doctrine, together with the substantial evidence rule, is background for our consideration of most of the issues presented on this appeal.

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[17]The Commission made no assessment of the effect of its prices on supply, demand, reserves, or industry structure. The Supreme Court advised that in future cases the Commission should state more "fully and carefully ... its assessment of the consequences of its orders for the character and future development of the industry." 390 U.S. at 792, 88 S. Ct. at 1373.

B. *The Southern Louisiana Area Rate Cases*

All parties are in agreement that Southern Louisiana is the most important gas-producing area in the country. The FPC has defined this area to include all parts of the state south of the thirty-first parallel, together with all offshore territory[18] in the federal domain that would be bounded by the Louisiana borders extended into the Gulf. At present, Southern Louisiana accounts for approximately one-third of the nation's gas production, and its untapped, unproven reserves, particularly those in the offshore portion, are among the nation's most promising. Natural gas, in turn, is the nation's most important, or at least most widely used, source of energy.[19]

Proceedings to set rates for this area began in 1961, nearly a decade ago. The initial hearing ended in 1965 and the examiner rendered his decision in 1966, after the Commission had written its *Permian* opinion. The Commission rendered its final decision in 1968, a few months after the Supreme Court had decided *Permian*. The decision was modified in some respects by a new opinion on rehearing in early 1969.

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[18] "Offshore" gas production, in this opinion, means production outside state boundaries and thus not subject to state severance taxes, i.e., that in the federal domain.

[19] In 1965, the year the record in this case closed, Bureau of Mines figures attributed 35.7 percent of this nation's total energy production to natural gas. The percentage has been steadily increasing over the years. For 1968, the producers quote a figure of 37.5 percent. Brief for Amerada Group at Appendix B-2.

(1) The Rate Structure

The Commission repeated in Southern Louisiana the multiple rate structure it had introduced in *Permian*, this time setting three different price levels for what it denominated as first, second, and third vintage gas. For first vintage gas, that for which contracts of interstate sale had been made prior to 1961, the Commission set a ceiling of 18.5 cents per thousand cubic feet (Mcf). For second vintage gas, that contracted for between the dates of January 1, 1961, and October 1, 1968,[20] it set a ceiling of 19.5 cents. For third vintage gas, that contracted for after October 1, 1968, it set a ceiling of 20 cents. For offshore gas in the federal domain, which is not subject to the Louisiana severance tax, it set prices for each of the three vintages 1.5 cents below onshore levels. For casinghead gas (gas produced in association with oil), the Commission set prices equal to those of first vintage gas irrespective of the vintage. The Commission found that casinghead gas is discovered largely as a product of the search for oil and exploration for it thus could not be encouraged by the higher prices of second and third vintage gas.

The price structure thus established is summarized in the following chart:

Vintage or Type	*Onshore Price*	*Offshore Price*
First vintage	18.5 cents	17.0 cents
Second vintage	19.5 cents	18.0 cents
Third vintage	20.0 cents	18.5 cents
Casinghead	18.5 cents	17.0 cents

[20] The reasons for the establishment of the January 1, 1961 date were similar to those for its establishment in Permian. *See* note 15 *supra*. The October 1, 1968 date marked the approximate end of these proceedings before the Commission.

The prices for new, nonassociated gas are higher than those for all other vintages and well types, because the Commission determined, as it has in *Permian*, that price should be used to elicit the appropriate level of future exploration and development. In order to enforce these ceilings for gas of first and second vintages that had already been produced and consumed, the Commission ordered substantial refunds of moneys collected in excess of its maximum rates.[21]

(2) The Commission's Cost Determinations

Although the rate structure contains some noncost elements, it is closely tied to cost computations.[22] The Commission used two different methods of computing costs, one of which it applied to old gas (first and second vintage) and the other to new gas (third vintage). New gas is priced to allow for the appropriate level of exploration, and the Commission determined that exploration for gas was and should be undertaken on a nationwide basis, so new gas costs are based upon present costs for the entire nation. Old gas is priced so as to allow recovery of costs actually incurred in its production, and therefore the costs used are historical area costs, i.e., those of the Southern Louisiana area itself during the periods covered by the earlier vintages.

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[21] The Commission ruled that, by further order, it would require refunds of the difference between the amounts collected and amounts that could have been received under the applicable area rate (or the amounts that would have been received under firm certificates or settlement rates if those rates were higher than the area rate).

[22] The Commission relied upon published data, testimony, and questionnaires filled out by producers to collect its raw cost data.

The bulk of the Commission's opinion is devoted to computation and explanation of costs. Included in its total is an allowance for a rate of return of 12 percent, which is the same rate that was set and approved in *Permian*. We have set out the other elements of the Commission's cost findings in tabular form in the footnote below.[22]

(3) Moratoriums on Increases in Excess of Maximum Rates

In establishing rate ceiling freezes, the Commission went substantially farther than it had hazarded in its earlier *Permian* decision. It imposed a moratorium of a little more than five years — lasting until January 1, 1974 — on rate increases for third vintage gas in excess of the maximum prices it set. For first and second vintages, the moratoriums were to last indefinitely. These moratoriums mean that the vintage ceilings are to remain in effect throughout their duration, and that

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[22] All figures given are unit costs, in cents per Mcf. The grouping of flowing gas costs is different from that for new gas; the flowing gas E&D computation, for example, contains some

Item	*New Gas*	*Flowing Gas*
Exploration and Development	4.14	4.17
Production Operating Expense	2.70	1.93
Liquid Credit	(3.30)	—
Depletion, Depreciation, Amortization	4.04	3.19
Return on Investment	5.33	5.17
Return on Working Capital	0.35	—
Regulatory Expense	0.15	0.17
Royalty	2.24	—
Area Gathering	0.51	0.51
Production Tax	2.30	2.30
TOTAL	18.80	18.36

producers cannot collect prices in excess of maximum rates even subject to refund.

However, the Commission provided, as it had in *Permian*, that it would always be open to a petition to lift moratoriums for individual producers or to modify area rates as a whole in the event that changed circumstances made either of these steps advisable. Moreover, it quoted language of the Supreme Court stating that it would be "desirable" if the Commission specified more precisely the conditions for relief and, in response to this language, gave examples of changes that would cause it to lift moratoriums or change rates.[24]

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[24] Area rates "will be modified if a showing is made that unit costs — reflecting amounts spent and reserves found — have increased to such an extent that an increase in area rates is required." As to individual producers, the Commission recognized that it was avoiding "precise specification of circumstances that would justify special relief," but stated that:

> "However, certain principles have been established. Overall high cost of service of an individual producer is not a ground for relief. The fact that current revenue from a particular well is less than the costs of continuing its production is a ground for relief. The fact that a producer can obtain a higher price elsewhere is not a ground for relief. Certain producers have already requested price relief, contending that unusually high pressure, great volume, concentrated delivery points, delivery of large quantities at one point, unusually high gas quality, unusually good deliverability and the availability of gas for swing purposes justify an increased price. We have determined that none of these, nor all of them together, are grounds for price relief."

These and other statements of the Commission, taken together, probably constitute as specific an exposition of circumstances for relief as can be expected at this stage in area regulation.

In addition to setting maximum rates, ordering refunds, and imposing moratoriums, the Commission took action along a number of other lines that are of lesser significance in this case.[25]

(4) Commencement of New Proceedings for this Area

On December 15, 1969, shortly before oral argument in the instant case was heard, the Commission instituted new proceedings to reconsider all major actions it had taken in the orders before us. In other words, the Commission is now holding hearings that will probably result in substantial modifications of the rates set in this case. In its order initiating the proceedings, the Commission advised the parties that it would receive evidence concerning "the adequacy of gas supply and adequacy of service to consumers, the demand for gas, the cause of a gas shortage, if any, the effect of price on gas supply and demand, and other relevant economic evidence, together with data as to the current, nationwide cost of finding and producing nonassociated gas."[26] Similar considerations

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[25]The Commission established a system of quality discounts that were to be used in adjusting maximum rates, outlawed certain types of flexible pricing clauses resulting in increases over ceilings, created special exempt types of producer sales, exempted "small" producers from certain requirements, and determined that minimum rates need not be established.

[26]*Order, Enlarging Investigation and Proposed Rulemaking*, 1969, ____ F.P.C. ____ [No. AR69-1; slip opinion dated December 15, 1969, at 3]. The Commission indicated that "we desire to have this proceeding expedited in every way possible." Prehearing was set for January 27, 1970.

The Commission had already set part of the offshore territory for reconsideration in its opinion on rehearing. The Order

are to be taken up with respect to old gas, and the moratoriums are to be re-examined.

Since the new proceeding may affect rates for all vintages, and since the data the Commission has called for reflects the possibility of a radical change in approach, this Court was naturally concerned about the effect of the new proceeding upon our disposition of the instant appeal. At oral argument, however, all parties agreed that the proceeding should have no effect upon our review, and we now agree.[27] Above all, we do not view the new proceeding as a "confession of error" by the Commission as the producers have invited us to do. It is true that the Commission now recognizes the possibility of a serious supply deficiency and that it did not recognize this possibility in the decision we are reviewing.[28] This awareness, however, and the Commission's prompt action upon it, militate in favor of affirmance rather than reversal. The new proceeding is evidence of the Commission's ability to adapt the regulatory process to changing circumstances. We conclude that the indications that there is a supply deficiency should be examined in this second-round proceeding before the Commission. The

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of December 15 enlarged that proceeding to include the entire area.

[27]The maximum rates that the Commission has set, in addition to the moratoria, are to remain in effect throughout the new proceeding, which may last for years. Moreover, it was never contemplated that there should be a single area proceeding setting rates once and for all; rather the Commission has always made it clear that it intended to review the rates it had set whenever the circumstances made it advisable to do so. *See* note 24 *supra*.

[28]*See* section III D *infra*.

evidence that there is a deficiency seems very strong, but given the Commission's actions we are convinced that it can now deal with the problem as effectively as present circumstances will allow.

At this point, we proceed into analysis of the specific arguments made by the consumer interests on the one hand and by the producers on the other.

II. THE CONSUMER ARGUMENTS

There are three main arguments advanced by the intervening parties on this appeal. First, these parties contend that the Commission overstated certain of its calculated costs. Second, they argue that the record does not furnish substantial evidence to justify a rate of return as high as 12 percent. Thirdly, they argue that the Commission committed reversible error in adding noncost factors to a rate based upon the costs (including return) it had computed. We take up the consumer issues in this order.

A. *The Commission's Cost Determination*

The consumer interests contend that the Commission overstated production operating expense for old gas by excluding casinghead gas, which is cheaper to produce, from consideration.[29] They also attack the

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[29] About fourteen percent of gas produced in Southern Louisiana is casinghead, and the Commission states that "we are well aware that its indicated cost is substantially below that of gas-well gas." The ADG has calculated the difference in cost at about 3 cents. Assuming this figure to be correct (which we cannot really assume because joint costing of oil and gas is

Commission's allocation of exploration and development costs between oil and casinghead gas where oil and gas are discovered together.[30] They attack the

judgmental), the inclusion of casinghead gas into the computation of costs for the first vintage would result in a total decrease in first-vintage price from 18.5 cents to approximately 18.3 cents by our calculation, or a difference of just over one percent. Especially in view of the cost-computation structure as a whole, which has frequently involved the Commission in the approximations of interpreting joint costs, we consider this amount de minimis, even conceding its accuracy. But our rejection of this argument is based upon more fundamental considerations. The assignment of costs to products jointly produced, as are oil and casinghead gas, is not an exact undertaking, and we think the Commission has acted on the basis of substantial evidence, particularly since it has set a rate structure under which casinghead gas of all vintages is assigned the lowest price, that of first vintage. The Supreme Court approved a similar calculation in *Permian*. *Cf.* ICC, Bureau of Accounts, Statement No. 4-54, Explanation of Rail Cost Finding Procedures and Principles Relating to the Use of Costs, Ch. 1, pt. 4 (1954).

[30] It seems clear that oil, which is more valuable than a volume of gas of the same heat content, should bear more of the exploration and development cost. The Commission, as its first step in assigning these costs, determined a unit by which gas and oil could be compared: the amount of each that is required to produce a Btu of heat. It then determined what it called the "economic factor," which is the number of gas units that equaled in value a unit of oil. By strict computation, the Commission arrived at an economic factor of 4.0. This factor would have indicated the assignment of four times as much of the cost to oil as to gas. It then adjusted this factor to 3.5, however, to allow for the fact that revenues from flowing gas should be expensed against *present* drilling, which is undergoing a continuing shift away from searches directed solely at discovering oil toward searches directed at finding gas. We think it is reasonable for current revenues from flowing gas to be compared with current expenses in exploration for new gas. Thus the Commission adopted an allocation that assigned higher costs to exploration for gas than would its straight calculation, but it justified this modification by a qualitative finding that is based upon substantial evidence.

allowance for "plant gathering," or short-distance pipelining from wellhead to the producer's plant for the purpose of extracting salable liquids.[31] Finally, they contend that the Commission understated the credit for salable liquids extracted from the gas stream, which is subtracted from gas production costs.[32] We consider each of these matters in footnotes appended hereto.

On the whole, we find each of these cost criticisms defective for one or both of two reasons. First, they deal mainly with amounts that are small compared to the accuracy that can be expected of computations of

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[31] The consumer interests argue that these plant gathering costs should rather be assigned to those salable liquids, since they are incurred in producing them. On rehearing, the Commission indicated that the allowance might have been overstated slightly, but that ". . . the entire allowance is only 0.33 cents. The amount of possible excesses does not seem worth the burden of further hearings on other allocation methods." The Commission indicated that a significant portion of the 0.33 cents is chargeable against gas because part of the liquid revenues do not go to the producers at all but rather are paid to the leasehold, reducing its cost. Another significant part is also chargeable to gas, because transportation to a plant is usually done in furtherance not only of liquid extraction but also of moving the gas stream itself closer to the centralized point at which it must be delivered. Therefore, we agree with the Commission that possible excesses in the 0.33 cent figure, which is itself less than 2 percent of the total price, would be de minimis, and we hold that the plant gathering allowance is based upon substantial evidence.

[32] They argue that the credit of 3.5 cents for lease-extracted liquids and that of 0.50 cents for plant-extracted liquids is too low. The Commission calculated the lease liquid credit at 4.18 cents, but it reduced this figure to allow for a trend of decreasing revenues from these liquids. It reduced the plant liquids credit from a calculated 0.75 cent to 0.50 cent to allow for a duplication of credits elsewhere. These actions are supported by substantial evidence.

this nature.[33] Secondly, and more importantly, they place too much emphasis upon abstract manipulation of figures. There is nothing in the substantial evidence rule that prevents the Commission from performing calculations based upon necessarily imperfect assumptions when it explains the reasons for those assumptions. Likewise, there is nothing to prevent it from re-examining and adjusting the result of a calculation based upon imperfect premises, provided it justifies its actions on the basis of the record.[34]

B. *The Rate of Return*

Next, the consumer interests argue that the Commission acted arbitrarily, discriminatorily, or without substantial evidence in establishing a rate of return as high as 12 percent. The argument appears to be based upon the fact that the "special circumstances"

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[33]A generous reduction for all four cost criticisms considered here, if *all* of them were accepted, would certainly not exceed 1.5 cents. Commissioner Carver, on the other hand, indicates reasonable changes that could result in an *increase* of 4.0 cents, if all were adopted, in his dissent to the opinion on rehearing. *See* note 85 *infra*. The inherent, unavoidably approximate nature of rate regulation under legislative standards has been noted by both economists and courts, including the Supreme Court in *Permian*, 390 U.S. at 790, 88 S. Ct. at 1372 n. 59; *see also* J. Bonbright, Principles of Public Utility Rates 27, 67 (1960). Of course, the inaccuracy of pricing techniques is one reason why the FPC is required separately to determine the consequences of its pricing actions. *See* section III (D) *infra*.

[34]Provided it meets other requirements of law, the Commission may employ any "formula or combination of formulas" it finds appropriate. It may "make the pragmatic adjustments which may be called for by the circumstances." *FPC v. Natural Gas Pipeline Co.*, 1942, 315 U.S. 575, 586, 62 S. Ct. 736, 743, 86 L.Ed. 1037; *see also Permian*, 390 U.S. at 800, 88 S. Ct. at 1377.

cited in *Permian* as justification for the 12 percent rate of return — namely, that the gas was frequently of inferior quality so that the return was likely to be lowered — are not present in Southern Louisiana, where nearly all of the gas is of high quality.[35] Alternatively, it is based upon the contention that the Commission did not comply with the "comparable earnings" test of *FPC v. Hope Natural Gas Co.*, 1944, 320 U.S. 591, 64 S. Ct. 281, 88 L. Ed. 333.

We are not impressed with the argument that circumstances present in *Permian* are not present here, because even if, *arguendo*, we concede the relevance of this proposition, we find circumstances not present in *Permian* that are important here. The Southern Louisiana area is a crucially important gas-producing region in which new exploration needs especially to be encouraged. A great portion of the discoverable gas in the area is far offshore. The finding that new reserves of gas can be found without a significant rise in unit costs is premised in part upon the increasing use of new technology,[36] and the need to adapt produc-

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[35] We recognize possible validity in the consumers' argument that Commission reliance on such matters as hurricanes in fixing a 12 percent rate of return for Southern Louisiana is misplaced. It might have been more appropriate to treat these matters as above-the-line costs (reflected, for example, in insurance premiums) rather than as a risk upon which one obtains return. *Permian*, however, indicates that arguments of this type should be addressed to the discretion of the Commission. 390 U.S. at 811, 88 S. Ct. at 1383. Furthermore, we do not need to rely heavily upon these factors, because the Commission has advanced other justifications for the rate of return.

[36] *See* 3 Joint Appendix, pt. 1, at 239d (Initial Decision). The Commission relied heavily upon the examiner's findings in fixing the rate of return.

tion to a constantly changing technology involves risks that definitely justify a high rate of return even for an industry taken as a whole.[37] Furthermore, the possibility of a supply deficiency, a possibility that has become stronger during the pendency of this review, strengthens our conviction that substantial evidence supports a return as high as 12 percent.

Nor do we find any merit to the argument that the Commission failed to apply the comparable earnings test correctly.[38] In discussing the required rate of return, the parties varied in their recommendations from 9-9.5 percent (presented by consumer interests) to 20-24 percent (presented by the Hunt Oil group of producers).[39] The Commission considered all evidence,

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[37] *See* G. Stigler, Capital and Rates of Return in Manufacturing Industries 90-91 (1963); *cf.* J. Galbraith, The New Industrial State (1967).

[38] We note at the outset that the Commission is not required to compute rate of return on the basis of the comparable earnings test. The Permian decision states that "other tests might properly have been employed." (The Court cites with apparent approval the examiner's discussion of rate of return in this very case, the Southern Louisiana proceeding). 390 U.S. at 805, 88 S. Ct. at 1380 & n. 1; *see also* J. Bonbright, *supra*, note 33, at 240-83. However, we review the Commission's decision under the comparable earnings test because that is the standard it evidently followed.

The test has been formulated as follows: Return should be "equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties." *Bluefield Water Works & Improvement Co. v. PSC*, 1923, 262 U.S. 679, 692, 43 S. Ct. 675, 679, 67 L.Ed. 1176; *FPC v. Hope Natural Gas Co.*, 320 U.S. at 603, 64 S. Ct. at 288.

[39] The Amerada group of producers argued for a 16-18 percent rate of return. The FPC Staff recommended 9.5 percent and asserted that 12 percent "can well be considered as in excess

then made its determination by abstracting the rate of return earned by a group of unintegrated gas producers over the years 1958 to 1962.[40] It adjusted this figure slightly, in ways that it thought appropriate, to allow for possible inadequacies in its data base.[41] The Commission chose unintegrated gas producers because it quite reasonably decided that these companies would be most representative of the risks the industry was facing, and it chose the period 1958 to 1962 because that was the most recent for which the record furnished reliable data. In light of the standard of review, which is whether the Commission's findings are supported by substantial evidence, we are particularly unimpressed with the argument of one intervening party that the FPC "erroneously failed to consider relevant evidence." There is substantial evidence to support a rate of return as high as 12 percent, and the Commission properly applied the test expressed in *Hope*.[42]

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of the upper limit of the range of reasonableness." *See* 3 Joint Appendix, pt. 1, at 164d, 173d, 185d, n. 1. (Initial Decision).

[40] *See* 4 Joint Appendix, pt. 1, at 567d-74d (Commission's Opinion).

[41] "[W]e recognize that the limited available data on non-integrated companies refers to a few unusually successful producers. Also, earnings-book ratios of integrated companies deserve to be given some weight." *Id.* at 573d.

[42] The comparable earnings standard is a general one, encompassing several indicia of earnings and requiring both ability to attract capital and a fair return on equity. *Williams v. Washington Metropolitan Area Transit Comm.*, D. C. Cir. 1968, 415 F.2d 922, 933. Certain types of computation are unacceptable, *see Id* at 970 & n. 294, but the Commission has broad power to select the evidence upon which it should rely. We find that the Commission was obviously attempting to apply the comparable earnings test. The sole questions it struggled with were what companies' risks were comparable and what the earnings of those companies were. Its choice of evidence is reviewable under the substantial evidence standard.

C. *Noncost Elements in the Computed Prices*

As was previously mentioned, the Commission added small noncost elements to several of its maximum rates. It increased the second vintage ceiling by 0.7 cent over cost, the third vintage ceiling by 1.2 cents, and the ceiling on all offshore gas by an additional 0.8 cent.[43] The consumer interests attack these increments vigorously, describing them as "cushions," "bonuses," "lagniappes," and other labels implying that the producers are the object of open, unvarnished FPC generosity. They cite authority purportedly to the effect that a public utility cannot add noncost elements to a cost-based rate, relying heavily upon the recent *en banc* decision of the Court of Appeals for the District of Columbia Circuit in *Williams v. Washington Metro-*

[43] We are singularly unimpressed with the characterization of this offshore factor as a "phantom tax" by both the MDG and the New York Commission. These parties begin by stating that the computed cost difference between offshore and onshore is 2.3 cents (the amount of the Louisiana severance tax), go on to show that the Commission's ceiling for offshore is only 1.5 cents, and from this conclude that the Commission has allowed 0.8 cent for "phantom" taxes inapplicable to offshore, which is outside Louisiana's taxing jurisdiction. The conclusion is the baldest of sophistry, for the 0.8 cent allowance has nothing to do with the Louisiana tax. It is a noncost element intentionally added by the Commission, and we consider it as such.

It is only fair to add, however, that this sophistry was made possible, if not plausible, by the Commission's failure to label noncost factors specifically and to justify them in a way clearly independent of costs. It is also a product of conflicting implications in the Commission's findings. *See* sections IV A (1), (4) *infra*. The raising of phantom issues such as this one wastefully consumes the efforts of a reviewing court.

politan Area Transit Commission, D.C. Cir. 1968, 415 F.2d 922.[44]

The *Williams* case is part of a heavy volume of litigation concerning regulation of mass transit in the District of Columbia. The excellent opinion of the court of appeals deals with a number of issues that are remanded to the Transit Commission. The issue that relates to our case concerns a "cushion" in the computed rate of return, constituting the amount the Transit Commission thought was "required to enable [the D.C. Transit System, Inc.] to maintain a sufficient surplus to cover contingencies and to assure the financial stability of Transit."[45] The court concluded that a fair and reasonable rate of return would itself include

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[44]The main thrust of the MDG argument is that the Commission failed to include adequate justification for the noncost factors in its opinion, an argument with which we would be inclined to agree were it not for the newness of area regulation. *See Colorado-Wyoming Gas Co. v. FPC*, 1945, 324 U. S. 626, 65 S. Ct. 850, 89 L.Ed. 1235; *United States v. Carolina Carriers Corp.*, 1940, 31 U.S. 475, 62 S. Ct. 722, 86 L. Ed. 971. This is a procedural issue crucial to appellate review. *See* notes 110-11 *infra* and accompanying text.

[45]All other issues remanded to the Transit Commission were so treated because of a lack of required findings, but the court disapproved completely the cushion in the rate of return. The Transit Commission had included the amount because of the possibility that its "conservative" cost and revenue findings might be inaccurate. It expressed a preference for adding a cushion above costs to cover this possibility rather than allowing for it in its cost findings because adjustment in cost findings would be compounded by the addition of return. The court did not dispute this proposition, which indeed is indisputable, but stated that "[n]otwithstanding the uncertainty that attends all prophesy, a regulatory agency is bound to make its forecasts as accurate as it possibly can, and a reviewing court is entitled to assume that it has done so."

assurance of financial stability and that under the circumstances the return added to costs was all that the Transit Commission should have allowed.

Even if we were to construe this case as broadly disapproving noncost elements, the application to the sprawling, wildcatting gas producing industry of principles developed in regulating bus and telephone companies would require major adjustments.[46] But this is not the extent of our disagreement with the argument advanced by these intervening parties. We do not understand the law of industry regulation, including the Williams case,[47] to prohibit noncost elements that are

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[46] The gas industry is different from metropolitan transit in that it requires a constant infusion of entrepreneurship of the highest order if even basic public needs are to be satisfied. The D.C. Transit System will continue to operate even if the return its investors expect in a given year is poor, because it is a true public utility subject to the orders of the Transit Commission. Its service may not be of the best quality if rates are too low, or, more importantly, its owners may have a Constitutional claim against the Government, but the public will not be irreparably injured. On the other hand, we count upon persons who carefully weigh investment risks for our supply of natural gas. We think the Commission here, having calculated the dangers involved in allowing the gas supply to lapse, and the probabilities that its estimates might be too low, is justified in having added the small noncost factors it thought were necessary. It found that it needed to do so to protect the public interest and not to assure any rights of gas producers. However, as the *Williams* case indicates, the use of noncost factors to allow for possible inaccuracies is not favored. Inaccuracy, if that is *really* the concern (and not higher costs), can result in a windfall to producers as easily as in a loss. *See* note 47 *infra*. We approve the use of noncost factors for this purpose under the facts of this case only.

[47] *Williams* is distinguishable from our case in several respects; it is so clearly so, in fact, that we feel justified in concluding that it is based not on disapproval of noncost increments but

based upon appropriate grounds. In *Permian*, the Supreme Court unequivocally stated that the FPC is not bound by the sum of cost and return even if it adopts costs as the primary basis of its calculations.[48] The most persuasive reason for this rule is that cost pricing is circular. Past production has taken place at a given level; if a regulatory body fixes prospective prices at the cost of that production, it may be freezing the level of production, too.[49] We think that the need for dramatically increased production from Southern Louisiana justifies the noncost factors added here, and that the FPC has power to include noncost elements that reflect its assessment of the need to use price as a tool to influence such economic relations. These are propositions that apply generally to regulation of utilities and quasi-utilities.

The Commission explained the reasons for its noncost additions as follows. The 0.8 cent cushion added to offshore gas prices was a reflection of the growing importance that offshore will have to assume if future development of reserves is to meet demand and also

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upon disapproval of egregiously inattentive regulation. The cushion had been added ostensibly to allow for inaccuracies in cost computations, but the court found that as the computations had been made any inaccuracies would lie on the side of generosity to the Transit Company. Moreover, in earlier years regulation by the Transit Commission had allowed, in reality, a return of equity of 21 percent for the Company, as versus a "comparable earnings" return computed at 7.5-8.7 percent. The Transit Commission had made no findings as to comparable earnings. 415 F.2d at 936-37, 973-74.

[48] 390 U.S. at 815, 88 S. Ct. at 1385 & nn. 97-99

[49] This argument is widely accepted; indeed, it was cited with approval in *Permian*. *See Id.* at n. 99 and authorities therein cited.

of the unavoidable uncertainty of cost data concerning offshore, since offshore drilling in deep water is a relatively new undertaking.[50] The noncost increments on second and third vintage gas prices were cushions against the possible adverse effects of cost changes or inaccuracies during a lengthy price ceiling freeze.[51] The Commission found that price stability over a longer period of time would be more in the public interest than a rate that was lower by a few percentage points, and we conclude that the length of these proceedings by itself furnishes substantial evidence to support this finding. We have no hestitation, moreover, in holding that this purpose is an appropriate one for inclusion of noncost elements in a cost-based price.[52] However, the Commission's fulfillment of its procedural duty of making findings leaves much to be desired.[53] In view of the Commission's failure to relate

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[50] These considerations are in apparent conflict with the Commission's finding that "it has not been demonstrated that the unit cost of gas is greater offshore than onshore." 4 Joint Appendix, pt. 1, at 622d. The Commission could have reconciled this conflict by indicating, for example, that it had *some* reason for thinking costs might be higher, or that the newness of the undertaking and the consequent unavailability of cost data was itself a risk justifying a higher return.

[51] This finding should have been discussed in light of the Commission's finding that costs were unlikely to rise. Evidently the Commission recognized some probability that costs would rise slightly, and the amount of the cushion is tied to this probability — but the Commission has not exposed its reasoning.

[52] *Cf.* 390 U.S. at 815, 88 S. Ct. 1385, n. 98.

[53] The Supreme Court affirmed in *Permian*, however, while being forced to read the Commission's mind even more than we are. The Commission there had said that "no [noncost] adjustments are required in the Permian Basin." 34 F.P.C. at 207. But the Supreme Court found that the Commission had actually used four separate types of noncost factors and had justified each. 390 U.S. at 815, 88 S. Ct. at 1385 n. 98.

its noncost additions to specific probabilities concerning influences upon supply or to make any showing as to the demand they are needed to meet,[54] we are hesitant to sustain the use of these increments and do so only because the Commission is still in the experimental stages of area regulation. We shall have more to say about these deficiencies below. At this point, we emphasize the fact that the Commission has justified the noncost factors by reference to considerations that ostensibly affect not private but broad public interests.[55]

We conclude that the arguments advanced by these intervening parties are without merit.

III. THE PRODUCER ARGUMENTS

The producers present the following four major arguments to this Court: First, that the moratoriums are unlawful; secondly, that the Commission failed to follow the comparable earnings test in assessing a

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[54] Noncost factors will often in the ultimate analysis relate to these market variables, although there are other possible justifications for them. Where noncost elements are used to relate supply and demand, the level of each and the relationship between them must be explored. Here, adequate supply, even though the Commission has not examined it, is obviously a major consideration lurking behind the noncost additions, expressed in the Commission's frequent allusions to the "importance" of the Southern Louisiana area. A finding as to "importance," without any identification of or discussion of the specific characteristic of the region that is important, is of little benefit to a reviewing court.

[55] *See* note 46 *supra*; *cf.* note 47 *supra*.

rate of return as low as 12 percent; thirdly, that the Commission's cost determinations are unlawful or erroneous; and finally, that the Commission failed to make the findings necessary to relate supply, demand and price according to the "end result" test of the *Hope* and *Permian* cases. We take up the issues in this order, with particular emphasis on the supply problem presented in the last argument.

A. *The Moratorium Provisions*

The producers' attack on the moratoriums is based upon the fifth amendment to the Constitution, the Natural Gas Act, the Administrative Procedure Act, and factual issues pertaining to the case. In *Permian*, as we have noted, the Supreme Court affirmed the Commission's imposition of a two-and-one-half year moratorium on rate filings in excess of ceilings. However, it did so only for the limited circumstances before it, and left the question of longer moratorium legality almost completely open:

> We cannot, given the apparent stability of production costs, the Commission's relative inexperience with area regulation, and the administrative burdens of concurrent area proceedings, hold that this arrangement was impermissible. We need not attempt to prescribe the limitations of the Commission's authority under §§ 5 and 16 to impose moratoria upon § 4(d) filings; in particular, we intimate no views on the propriety of moratoria created

> in circumstances of changing costs. These and other difficult issues may more properly await both clarification of the Commission's intentions and the necessities of the particular circumstances. *We hold only that this relatively brief moratorium did not, in the circumstances here presented, exceed or abuse the Commission's authority.*[56]

Considering this language, we think it incumbent upon this Court to meet the producers' arguments against these lengthier moratoriums as undecided questions.

At the outset, we find little merit to the producers' Constitutional complaints. The possibility that they may be deprived of property without due process of law is speculative and remote, and if such a deprivation occurs both courts and Commission will stand ready to remedy it. For the present, we find no such deprivation. Economic regulation under the commerce power, affecting an industry generally, is not a taking of property if the value of property is thereby reduced or business risks increased.[57] The producers have a

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[56] 390 U.S. at 782, 88 S. Ct. at 1367 (emphasis added).

[57] No constitutional objection arises from the imposition of maximum prices merely because "high cost operators may be more seriously affected * * * than others," *Bowles v. Willingham*, *supra*, 321 U. S. at 518, 64 S. Ct., at 649, or because the value of regulated property is reduced as a consequence of regulation. *FPC v. Hope Natural Gas Co.*, *supra*, 320 U. S. at 601, 64 St. Ct. at 281; Permian, 390 U.S. at 769, 88 S. Ct. at 1361. *See also West Coast Hotel Co. v. Parrish*, 1937, 300 U.S. 3791, 57 S. Ct. 478, 81 L. Ed. 703; *Nebbia v. New York*; 1934, 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940; *Munn v. Illinois*, 1877, 94 U.S. 113, 24 L. Ed. 77.

fifth amendment right not to be forced to sell or surrender their property without either due process or just compensation, but the Constitution gives them no right to raise prices irrespective of Commission approval in the absence of a deprivation of property.

Similarly, we find no merit to the producers' argument under the Administrative Procedure Act.[58]

The moratorium provisions were validly promulgated after adequate notice when the rate proceeding began.[59] With these considerations disposed of, we turn to the more difficult questions presented under the Natural Gas Act.

The procedure contemplated by Section 4 of the Natural Gas Act[60] is designed to protect sellers from the

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[58] 5 U.S.C. § 550 *et seq.* (1967).

[59] The argument is based upon the following two contentions: first, that sections 7 and 8 of the APA, read in conjunction with section 4 of the Natural Gas Act, require rate orders to be made upon formal hearing and not upon the "informal" procedures established here, and second, that the issuance of the moratorium order was not preceded by the public notice required by section 4(b) and other sections of the APA. The answer to the first argument is that the instant proceeding is the rate order required to comply with sections 7 and 8; we do not think these sections apply to the decision whether to grant individual relief after the just and reasonable rates have been set. This is the clear import of the *Permian* approval of group regulation. *See* 390 U.S. at 744, 88 S.Ct. at 1364, distinguishing *Bowles v. Willingham, supra*. The second argument likewise has no merit. The Commission published notice regarding the commencement of area proceedings, and the notice in our view was sufficient to inform all parties that ancillary regulations would be considered. 26 Fed. Reg. 4296 (1960).

[60] 15 U.S.C. § 717c (1963).

possibility of property deprivation through confiscatory rates that might not be increased quickly enough under ordinary hearing procedures. Section 4 provides that "[u]nless the Commission otherwise orders," a natural gas company must file a notice of rate increase thirty days before the effective date if it increases its rate unilaterally. The Commission may suspend the rate increase for a period of no more than five months, during which time it must begin hearings to determine whether the increased rate is just and reasonable. If the hearings are not completed by the end of five months, the gas company may collect the increased rate subject to refund. Limited encroachments upon this procedure have been permitted the Commission when they were necessary to effectuation of other requirements of the Act, the most notable being the Supreme Court's approval of the *Permian* moratorium.[61]

In considering the legality of moratorium provisions generally, we begin with the proposition that under section 5(a)[62] of the Act the Commission may determine rates and prescribe the "rule, regulation, prac-

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[61] The Court in *Permian* also approved Commission orders of indefinite duration prohibiting increases above maximum rates brought about by flexible pricing clauses. 390 U.S. at 782-83, 88 S. Ct. at 1368-69. *See also Atlantic Ref'g Co. v. FPC*, 1959, 360 U.S. 378, 79 S. Ct. 1246, 3 L. Ed. 2d 1312 (approving prospective ceilings on price in section 7 proceedings); *cf. United Gas Improvement Co. v. Callery Properties, Inc.*, 1965, 382 U.S. 22, 86 S.Ct. 360, 15 L. Ed. 2d 284.

[62] 15 U.S.C. § 717d(1963). Moreover, section 16 of the Act, 15 U.S.C. § 717o (1963), gives the Commission power "to perform any and

tice, or contract to be thereafter observed." Thus section 4 does not give producers an "invincible right to raise prices subject only to a six-month delay and refund liability."[63] The section provides only that "a change *cannot* be made without the proper notice to the Commission; it does not say under what circumstances a change *can* be made."[64] Thus the Commission is not required to follow the procedure that section 4 contemplates for each individual producer. Moreover, once a just and reasonable rate has been established, the Commission has a responsibility to prevent rate increases in excess of that rate without changes in circumstances. The Supreme Court recognized this Commission responsibility with regard to gas producers in the *Phillips* and *CATCO* cases, and it recognized that the Natural Gas Act contemplates FPC power to carry out its purposes realistically.[65] If the Commission is to discharge its duty of regulating production, it must use the area rate ceiling method or some analogous industrywide approach. It cannot regulate individual producers simply because the strain that approach would put upon its time and resources would be prohibitive. And moratoriums are necessary if the area regulation method is to work at all. Uni-

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all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter."

[63] *United Gas Improvement Co. v. Callery Properties, Inc.*, 1965, 382 U.S. 223, 232, 86 S. Ct. 360, 365, 15 L.Ed. 284 (separate opinion of Mr. Justice Harlan).

[64] *United Gas Pipeline Co. v. Mobile Gas Service Corp.*, 1956, 350 U.S. 332, 339, 76 S.Ct. 373, 378, 100 L.Ed. 373.

[65] *See* notes 5-13 *supra* and accompanying text.

lateral producer price increases in excess of the ceilings would otherwise involve the Commission immediately in the task of determining whether each increased rate was just and reasonable in terms of the financial position of each individual producer, which is precisely the problem the Commission faced before area regulation and so badly needs to avoid.[66] By putting a ceiling on rates in such a manner that the ceiling is likely to cover the just and reasonable rate for a number of years, and imposing a moratorium that lasts no longer than the period that the ceilings are likely to be adequate the Commission can discharge its regulatory responsibilities with minimum encroachment on the salutary procedures contemplated by section 4.[67]

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[66] Certain of the producers urge that §§ 4 and 5 must in combination be understood to preclude moratoria upon filings under § 4(d). They assert that the period of effectiveness of a rate determination under § 5(a) is limited by § 4(e); they reason that § 4(d) creates an unrestricted right to file rate changes, and that such changes may, under § 4(e), be suspended for a period no longer than five months. If this construction were accepted, it would follow that area proceedings would terminate in rate limitations that could be disregarded by producers five months after their promulgation. The result, as the Commission observed, would be that "the conclusion of one area proceeding would only signal the beginning of the next, and just and reasonable rates for consumers would always be one area proceeding away." 34 F.P.C., at 228. 390 U.S. at 781, 88 S. Ct. a 1367. The same conditions, of course, are present here.

[67] It is to be emphasized that the moratorium provisions do not prohibit increased rate filings. They prohibit rate filings *in excess of the ceilings*. These ceilings are the maximum prices that the Commission feels can be considered just and reasonable. The Commission has added noncost increments to the rates that present the greatest danger of inadequacy, and it

It remains to consider whether the moratoriums actually imposed here are factually supportable — whether they are in fact reasonable and based upon substantial evidence. Our discussion above indicates that these factors should be examined in light of two considerations: First, whether the moratoriums as ordered are necessary to effective area regulation, and second, whether substantial evidence indicates that they are unlikely to result in inadequate ceilings later in their duration.[88] If moratoriums may be approved in principle, we have little difficulty in approving a moratorium of five years under the circumstances here. In *Permian*, the two-and-one-half year moratorium was exhausted before the Commission's order was finally affirmed by the Supreme Court.[89] To prescribe a moratorium of five years on a finding that stable prices for the area are desirable, we think, is within the discretion of the Commission, especially when the proceeding to establish those rates has been longer than five years and appellate review promises to lengthen the period substantially. A five-year mora-

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has provided avenues of extraordinary relief, both industry-wide and on an individual-producer basis, whereby the moratoriums may be lifted. We do not think that the moratorium provisions, which are necessary to the area regulation process, "write section 4 out of the Act," as the producers have contended.

[88] These two considerations can also be extracted from the following *Permian* language: "We cannot, given the apparent stability of production costs, the Commission's relative inexperience with area regulation, and the administrative burden of concurrent area proceedings, hold that this [moratorium] arrangement was impermissible." 390 U.S. at 781, 88 S. Ct. at 1367.

[89] Moreover, the Tenth Circuit had stayed the moratorium order and it consequently had no effect at all throughout its duration. 390 U.S. at 777, 88 S.Ct. at 1365.

torium in this case is also justified by the Commission's observance of recent trends and its conclusion that costs are remarkably stable or even slightly declining. This finding, together with the noncost factors, makes it reasonable to conclude that the rates will not in the future become unfairly low *provided* they are set at just and reasonable levels now. Of course, the practical effect of our approval of this moratorium is minimal, however, since the Commission is reviewing all moratoriums in the new proceedings, and supply problems, if they exist, will require quick remedies.

We have greater difficulty with the indefinite moratoriums imposed upon first-and-second-vintage prices. Our trouble is based not only upon the fear that these provisions could some day result in inadequate ceilings — even though the Commission has made findings based upon substantial evidence that cost increases in the *near* future are unlikely — but also upon our apprehension that they are in excess of what is reasonably necessary for area regulation to function. Consequently, although we have determined that the Commission should be affirmed in full, we limit our approval of the indefinite moratoriums to the circumstances present on this appeal. We stress the fact that the Commission is holding hearings now to determine whether the moratoriums should be modified, and that the result of this determination should be reviewed without reference to approval on this appeal.[70]

[70] Specifically, considerations relating to the law of the case should be accorded only limited significance, since experience with area regulation may increase to such an extent as to constitute a change in circumstances.

We also emphasize that the experimental nature of producer regulation makes us as yet reluctant to reverse the Commission on a matter which has little present impact[71] and which can be corrected, if experience shows it erroneous, in the future. These considerations, together with the Commission's findings and its demonstrated willingness to use the avenues of relief it has provided, elicit our qualified affirmance of the moratorium provisions.

B. *The Rate of Return*

The producers attack the rate of return mainly on the ground that the Commission failed to follow properly the comparable earnings test expressed in *Bluefield Water Works & Improvements Corp. v. PSC*, 1923, 262 U.S. 679, 43 S.Ct. 675, 67 L.Ed. 1176, and *FPC v. Hope Natural Gas Co.*, 1944, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333.[71A] They particularly claim that the period chosen by the Commission was unrepresentative, and present persuasive evidence to that effect.[72]

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[71]Theoretically speaking, the indefinite nature of the moratorium will assert itself only in the future. Practically, it will have some effect on industry expectations and hence industry conduct. But since the new proceedings before the Commission create expectations that ceilings may be changed, we consider the present effect of the indefinite moratorium to be minimal.

[71A]We reiterate, as the producers seem to lose sight of the fact, that the Commission is not *required* to compute return by the comparable earnings test. *See* note 38 *supra*.

[72]The producers' most easily comprehended presentation is a graph over the years 1947 to 1968 of rates of return they considered comparable. The 1958-1962 period chosen by the Commission is decidedly a dip in the curve, reflecting a recession during these years. Also, the producers attack the Commission's choice of companies to compare and failure to consider evidence showing a rise in earnings since 1963. Persuasive evidence, however,

The trouble is that we have already determined, in our discussion of the consumer-interest contentions concerning this issue, that there is also persuasive evidence to support the Commission's findings and the Commission followed proper legal standards. Reliance upon returns earned by unintegrated producers during the latest period for which the Commission felt it had reliable data was appropriate, in light of the widely divergent evidence presented in this case. Producer contentions to the contrary amount to an attack on the Commission's choice as to which evidence to believe.

C. *The Commission's Cost Determinations*

Producer attacks on the cost computations are many and varied. Most are cognizable under the substantial evidence standard. At the outset, however, we are met with the contention that the very method of cost pricing is too imprecise to be used in regulating the gas-producing industry. We must reject this contention. In a situation wherein the Commission has found that market imperfections tend to force price to ex-

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supports the Commission's action, and we are not engaged in finding these facts anew.

Furthermore, the rate of return even as set may be higher than 12 percent. Noncost factors, if they are viewed as additions to the return — and this is a logical way to view them, since they must go either to pay costs or to increase return — would increase return to 14-16 percent for new gas. Earnings on equity at a 12 percent rate on capital, of course, are higher than 12 percent because they are leveraged by debt; here they amount to about 13.3 percent. Finally, the producers' argument for a 16-18 percent rate of return is defective because it includes early years in which very high returns — well over 20 percent — distort the figure so that it is unreliable for present use.

cessive levels, it would be self-defeating to regulate on the basis of market forces, and the most logical alternative is usually cost pricing. Thus the fact that it cannot be made absolutely precise is not grounds for rejecting cost pricing when market conditions make its use advisable.[73] Indeed, some courts have held that costs *must* be at least the starting point for fixing just and reasonable rates in the gas industry. *E.g., City of Detroit v. FPC,* D.C. Cir. 1955, 230 F.2d 810. Even more persuasive is the fact that the Supreme Court upheld the use of cost pricing on a record similar to ours in its *Permian* decision.

Similarly, the producers make a broad attack on the use of average, rather than individual producer costs. We reject this attack as the Supreme Court rejected it in *Permian.*[74] There is nothing in either the Constitution or the Natural Gas Act that prevents the Commission from adopting price ceilings under which some producers will make more money than others or even under which some producers may be in danger of going out of business. The gas-producing industry, as the producers have pointed out to us, is not a true public utility, and one of its characteristics is the possibility of exit from the market.[75] This being the case, we find from the record that the use of average costs, whether it provides a fair return for all businesses

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[73] Imprecision is, however, one of the reasons for the requirement that a regulatory body reassess its rates in terms of purpose and consequences. *See* section IV A (3) *infra.*

[74] 390 U.S. at 818-20, 88 S.Ct. at 1386-87. *Cf.* 390 U.S. at 829-38, 88 S. Ct. at 1392-97 (dissenting opinion of Mr. Justice Douglas).

[75] *See* 3 Joint Appendix, pt. 1, at 77d (examiner's discussion of testimony and exhibits regarding rates of entry and exit).

or not, is lawful and based upon substantial evidence.[76]

In addition to these arguments, which are considerably weakened by their rejection in *Permian*, the producers have pressed one novel argument of a general nature against the cost determinations. They contend that the use of national costs to fix the price of new gas in this case is not substantial evidence because national data contain elements that seriously distort the costing of gas in Southern Louisiana. The producers' authority of strongest reliance is the Supreme Court's post-*Permian* decision in *Baltimore & Ohio R.R. v. Aberdeen & Rockfish R.R.*, 1968, 396 U.S. 87, 89, S.Ct. 290, ___ L.Ed.2d ___. The case condemns the use in railroad price regulation of average costs for an aggregate region when cost elements from part of the region may distort the calculation.[77] There are several reasons, however, why we find that decision inapplicable to the case before us. In the first place, the use of national figures here is based in part upon findings that these costs are the best available

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[76]A different question would be presented if the persons regulated were prevented in some manner from going out of business even when revenues fell below costs.

[77]The Court held that railroad rates for a route spanning two territories, served by two or more carriers in cooperation, cannot be divided among the carriers on the basis of costs for both territories taken together if the costs of lines in one territory distort the cost findings so derived for lines in the other. In the absence of a finding that there is no distortion, said the Court, the unadjusted costs for either territory or for the whole are not substantial evidence.

index to costs in Southern Louisiana,[78] despite inclusion of areas that are not of the same character as this region.[79] Secondly, the Commission has found that new exploration and development is national in scope. The operation of a particular piece of railroad trackage, on the other hand, is local to the place to be served; the supply of railroad service cannot be moved wherever it can be provided at least expense.[80] We accordingly hold that *Aberdeen & Rockfish* does not modify *Permian* approval of national costing in gas producer regulation and that it does not require reversal in this case.

Next, we must deal with the producers' contention that the Commission relied upon stale, unrepresentative data in making its cost findings. The staleness of the record is a serious problem. It is now 1970, and we are reviewing a case in which the record before the examiner closed in 1965. It is a case setting rates for a fast-growing, changing industry in a changing economy. The full Commission, which rendered its decision in 1968, was able to consider some data covering years as recent at 1966, and even this

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[78] The examiner, after extensive consideration, concluded that Southern Louisiana costs were probably slightly lower than those for the nation. 3 Joint Appendix, pt. 1, at 221d-31d.

[79] The producers contend, for example, that costs for the Hugoton-Anadarko area are significantly lower since reservoirs are shallower and should be excluded. The examiner's overall comparison of Southern Louisiana with national costs, however, is more to the point.

[80] There are limits to the movability of gas exploration, too, since a pipeline "cannot be moved around like a garden hose." *See* E. Neuner, *supra* note 9, at 282; note 101, *infra*; *Staff Report* at 17.

is data that there is reason to expect may already be stale.[81] Staleness of the record, however, is not itself a reason for reversal. *ICC v. Jersey City*, 1944, 322 U.S 503, 514-15, 64 S.Ct. 1129, 1134-35, 88 L.Ed. 1120;[82] *see also United States v. ICC*, 1970, 38 U.S.L.W. 4129, 4137. Much of the problem is attributable to the difficulty of the regulatory undertaking in light of the procedures currently available. Procedures must improve as the experiment of area regulation becomes better understood. Turning to another type of staleness argument, we are not impressed with the producer's complaint that the Commission chose to base some of its findings on older data than the most recent available. These choices were based upon findings as to greater reliability or representativeness of the data used.[83] Moreover, in such cases the Commission did not fail to consider the most recent data in the record, and it adjusted its findings to allow for rising or falling cost trends. Most importantly, it made a finding that costs as a whole during this decade had been remarkably stable (or were even declining slightly) and were likely to remain so, and this finding is based upon substantial evidence.[84]

Having made these determinations, and having inspected the producer's objections to specific cost cal-

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[81] *Compare, e.g.*, 4 Joint Appendix, pt. 1, at 546d (Commission's Opinion, calculating FP ratio at 1.37 for recent years in 1966) *with* Brief for Amerada Group at 17 (indicating FP ratio of approximately 0.62 for 1968, calculated from Bureau of Mines figures).

[82] It is to be noted that the *Permian* case, too, was eight years old when the Supreme Court issued its opinion.

[83] *See, e.g.*, note 72 *supra*.

[84] *See* 4 Joint Appendix, pt. 1, at 666d-76d (Commission's Opinion).

culations, we find that detailed discussion of these calculations would be of little value at this point. The producers point to, and adopt in part, the dissent of Commissioner Carver to the Commission's opinion on rehearing, which raises disturbing criticisms as to nine different types of cost determinations, which, if they had been determined differently, could be aggregated to increase the total by about 4.0 cents.[85] We think this imprecision in cost pricing is completely unavoidable, but the law allows the Commission to use cost pricing nevertheless. Moreover, Commissioner Carver did not present his four-cent increase for general approval, but instead stated that "it is certainly evident that not all of the above adjustments should be accepted." The thrust of the dissent, we think, is that

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[85] The Commissioner's computations produced the following:

Item	*Impact in ¢/Mcf*
22-year depletion period	0.48¢
Time lag of 1.57 years	0.28
Drilling costs — successful well	0.29
Related	
Lease acquisition	0.09
Return allowance	0.43
Unit capitalized outlay	0.31
Exploration and development	1.90
Dry Hole	0.19
Liquids credit	0.25

He added that "I have no idea that all or any of these figures are precisely correct; I think the Commission and its staff has no better idea. . . ." *Id.*

We find the arguments in this dissent to be strong ones, but it is not our task to choose which method we could use. The Commission has followed the cost method in this case, and we cannot reverse its decision here.

We have inspected the Commission's findings as to each of the cost items attacked by the producers with some care. Although we do not discuss each individually in order not to lengthen an already lengthy discussion (*cf.* notes 29-32 *supra*), we find each to be supported by substantial evidence.

the Commission should not have relied upon cost calculations floating in a vacuum but should have reviewed its computations in light of supply, demand, and other market forces (a proposition with which we definitely agree), and should have given greater attention to the settlement agreement proposed by several of the parties.[86] We reject the contention that cost pricing is so imprecise as to make its use unlawful and hold that the Commission's findings here are based upon substantial evidence. We proceed next to the important issues of supply and market, which we consider to be the key to the producer's attacks on the imprecision of cost pricing.

D. *Commission Findings as to the Consequences of Its Orders on the Gas Industry and Market: The Supply Problem*

(1) Commission Findings and the Legal Standards

We have reserved the most serious issue in this case for last. The producers contend that the Commission

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[86] Joint Appendix, pt. 1, at 1000d (dissenting opinion). The Commissioner stated that he could not decide this case on the basis of *any* cost record.

In light of the imprecision of costs, broad support for the settlement, evidence that the market has at least a procompetitive structure, and cumbersome nature of price regulation, it may be that the settlement arguments advanced by Commissioner Carver are persuasive. In this case, the settlement is championed by the producers, and before the Commission it was supported by gas distributors (whom we classify as representing consumer interests) accounting for over 87 percent of delivery volume. *Id.* at 1001d. Widespread use of the settlement technique would result in negotiation pitting market forces against each other on an aggregate scale, overseen by the Commission."

improperly failed to consider projected consumer demand for gas in relation to supply and that it thus violated the "end result" test of the *Hope* and *Bluefield* cases. These contentions are closely related to the argument that the Commission's cost determinations are imprecise, for the "end result" test is simply that whatever method a regulatory body uses, the result of its effects must be demonstrably in keeping with the purposes of regulation.[87] The FPC must evaluate each rate set against policies as broad as the Natural Gas Act itself. *Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581, 605, 65 S.Ct. 829, 840, 89 L.Ed. 1206. The purposes of the Act encompass not only

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[87]It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important.
FPC v. Hope Natural Gas Co., *supra*, 320 U.S. at 602, 64 S. Ct. at 288.

In keeping with this statement, we would not have such serious misgivings about affirming this order, with all the infirmities of the Commission's pricing methods, if the Commission had adequately considered its result in a larger context. A reviewing court, which is not privy to the Commission's special knowledge, is not likely to be able to make the assessment of results that the Commission could. We are troubled greatly by the fall in the FP ratio, for example, and cannot know whether it is so serious as to warrant some immediate, extraordinary action by this Court. The point is that without adequate consideration by the Commission of ultimate market impact, even slight troublesome facts assume fearful proportions. In this case, the producers, as well as the FPC Staff, predict a severe gas shortage, with disastrous effects on consumers and the economy alike. This Court has little inclination to join the Commission in presiding over such a result.

reasonably low rates but maintenance of adequate service for the consumer, and the latter objective is the reason for the *Hope* requirement that rates must be "sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital."[88]

The Supreme Court, while affirming the Commission in *Permian*, made it clear that adequate findings along these lines would be required in the future: "Judicial review of the Commission's orders will therefore function accurately and efficaciously only if the Commission indicates fully and carefully the methods by which, and the purposes for which, it has chosen to act, as well as its assessment of the consequences of its orders for the character and future development of the industry."[89]

In this case, as in *Permian*, the Commission refused to make findings as to overall demand for gas either in the nation or from the Southern Louisiana area, and it likewise declined to estimate future supply under its order. Similarly, the Commission refused to make findings as to the advisable level of the RP (reserves to production) or FP (findings to production) ratios, or to assess the consequences of its or-

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[88]Indeed, the *Hope* case interprets the policy of the Act as involving both consumer interests and the autonomous interests of the industry. The Commission must "balance ... the investor and consumer interests." 320 U.S. at 603, 64 S. Ct. at 288.

[89]390 U.S. at 792, 88 S. Ct. at 1373.

ders on these ratios.[80] The closest that the Commission came to direct exploration of these problems is in its discussion of the FPC Staff's Econometric Studies, a lengthy set of calculations based upon empirical economic relations and designed to show how price, supply and demand are interrelated in the national economy. The Commission rejected these studies as unreliable.[81] Having rejected this quantitative approach, how-

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[80] The Commission's most specific finding as to demand appears to be that "there seems no doubt that natural gas will be a major and vital source of energy for many years to come." 4 Joint Appendix, pt. 1, at 664d. This assessment is practically useless and should be made with far greater specificity in future proceedings.

The Commission also stated that "[w]e must reject the findings-to-production and reserves-to production ratios as not substantially indicative for fixing ceiling rates in this proceeding." 4 Joint Appendix, pt. 1, at 529d. *But see* note 122 *infra*. The ratios need not have been directly considered in price computation, but the effect of the price on them should have been assessed.

[81] We agree that the econometric studies were fatally defective, for the reasons set out in the examiner's decision. 3 Joint Appendix, pt. 1, at 380d-408d. Their most basic and serious defect is their tacit underlying hypothesis that demand will call forth sufficient exploration to meet it regardless of cost or profit considerations. The examiner quoted the following argument advanced by Amerada:

> . . . Thus, Staff's projections indicate that total exploratory wells in 1970 will be 8,900 at the 17¢ assumed national average ceiling price and with competing fuel prices remaining proportional. A 14¢ ceiling price would yield 10,130 exploratory wells while a 20¢ ceiling price indicates only 8,380 would be drilled. Turning to the same year and under the same assumptions, Staff's alternative model suggests 624 successful gas exploratory wells will be drilled in 1970 if prices remain at current levels, with 742 at a 21¢ ceiling and 581 at a 22¢ ceiling. Even more wells are predicted to be drilled at lower ceiling prices such as 10¢ per Mcf. However, there is nothing in Staff's economic hypothesis or in the exploratory equations utilized which requires that we stop at the 10¢ assumed ceiling

ever, the Commission failed to approach supply and demand in either a semi-quantitative or qualitative way.

Instead, the Commission made less extensive findings as to the effect of its rates on the industry. It found, for example, that the costs it had calculated were likely to remain stable for some time to come. This finding is supported by substantial evidence, since costs had, in the past, shown a pattern of stability or even a slight downward trend, and all components of cost, except possibly production operating expense, were shown unlikely to change significantly.[92] Also, the Commission found that the rate

price. Thus, the Staff equation at a 2¢ ceiling price would predict that the industry would in 1970 drill 268,310 exploratory wells (Ex. 156, p. 9).

This, of course, is more exploratory wells than have been drilled in total since 1940. The reason for such absurd results is that Staff's exploratory equation fails to consider any cost related to exploration or production; it continues to blindly forecast increases in production due to the supposed stimulating effect of low price on demand." (Amerada reply brief, pp. 21-22)

Although we approve the Commission's action in rejecting these studies, we do not approve of its failure to consider supply in relation to demand. It should be pointed out that in doing so the Commission has itself committed an error similar to Staff's. The error is not so serious as that of utterly failing to consider the profit incentive, but the Commission *has* assumed, without supporting findings, that the cost-plus-return price will be *sufficiently* profitable to elicit supply to meet demand, whatever the level of demand. This is circular pricing. If demand rises and cannot be satisfied out of reservoirs that are easily enough found to allow the entrepreneur his profit, demand will not be satisfied. Having found that rigorous mathematical equations could not solve this problem, the Commission should have confronted it in a semiquantitative or qualitative way.

[92] *See* 4 Joint Appendix, pt. 1, at 667d-73d.

of return it had set was commensurate with that of industries with similar risks, and it concluded that consequently the industry should be able to attract capital sufficient to satisfy demand.[93] Its overall assessment of the revenues that would be produced under its rates and their effect was as follows:

Annual revenue reduction from	
Gas-well and oil-well gas under pre-1961 contracts	$ 41.4 million
Oil-well gas under post-1960 contracts	$ 0.1 million
Gas-well gas under subsequent contracts	$ 7.5 million
Total	$ 49.0 million

> We also estimate that under the maximum rates here allowed . . . [annual revenues] would amount to $519 million, or about 18.4 cents per Mcf (not including sizeable revenues from condensates and entrained liquids) and that these revenues will rise steadily . . . .
>
> In our judgment, the revenues allowed . . . should foster an active exploratory program consistent with both the financial needs of the industry and the protection of the public interest.[94]

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[93] We do not think reviewing courts should accept such conclusionary findings as this after the "experiment" justification for affirmance no longer applies. The Commission should have looked directly to sources and availability of capital.

[94] Joint Appendix, pt. 1, at 683d. The finding as to the total expected revenue is commendably specific. However, it is useless

The Commission did not explain the reasoning by which it arrived at this conclusion. Finally, the Commission examined the place of natural gas in the economy as a whole and concluded that although other energy sources are growing in importance, "there seems no doubt that natural gas will be a major and vital source of energy for many years to come and nothing should be done at this time which would prevent the exploration and development necessary to make available this clean, convenient, economical and increasingly popular energy source."[95]

(2) The Current Supply Situation

Despite the Commission's optimistic conclusion, the circumstances that have developed since its decision indicate a possibility; indeed perhaps a certainty, that the supply of gas is dangerously low. A serious shortage, in fact, may already be unavoidable because present conditions may render any remedial action ineffective in light of the lag time between remedy and result. Thus the producers point out to us that the FP ratio, for the first time since World War II, shows that findings have declined below production. In other words, the gas industry in 1968 took more gas out of the ground than it discovered. Together with a growing production curve, this fact is alarming, especially since it is likely that the FP ratio will remain below 1.0 for the foreseeable future.[96] The producers also

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to persons not privy to the Commission's expertise, because the Commission has simply stated a figure floating in a vacuum and concluded without more that this figure will "foster an active exploratory program."

[95] Joint Appendix, pt. 1, at 664d.

[96] *See* FPC, Staff Report on National Gas Supply and Demand 11 (1969) (projecting FP ratio as declining steadily from 0.92 in 1969 to 0.73 in 1975).

contend that the RP ratio is dangerously low, and despite the frequency with which this argument has been effectively categorized as a "cry of wolf,"[97] we are concerned about it here. A majority of the Commissioners on the FPC have alluded in public speeches to the seriousness of the supply problem.[98]

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[97]The New York Commission states that "In every major appeal, the producers' 'major issue' has been the claim that if the producer position were rejected, the result would be a widespread shortage of natural gas . . . ." Reply Brief for New York Public Service Commission at 14. In *Permian*, the Supreme Court noted that one party had characterized the producers' concern for the RP ratio as a "neurotic preoccupation." 390 U.S. at 817, 88 S. Ct. at 1386 n. 103. The producers there had argued that the ratio should be kept at a minimum of 20 to 1, and there was substantial evidence that lower ratios were acceptable. The Court evaluated the significance of these ratios as follows:

> Nothing in the record establishes as proper or even minimal any particular ratio. We do not suggest, nor did the Commission, that the Commission should not continuously assess the level and success of exploration, or that the relationship between reserves and production is not a useful bench-mark of the industry's future. We hold only that the Commission here permissibly discounted the producers' reliance upon this relationship to establish the inadequacy of its rate structure.

[98]*See* Address by Chairman White, A Regulator Looks at the Electric and Gas Industries with a Sidelong Glance at Investment Analysis, before the Financial Analysts Federation, May 16, 1969; Address by Commissioner O'Connor, Prospects for Future Gas Supplies, before the National Ass'n of Regulatory Utility Commissioners, October 7, 1969; Address by Commissioner Brooke, before the Independent Natural Gas Ass'n of America, September 9, 1969; Address by Commissioner Bagge, The FPC and Area Pricing: The Need for Re-examination, before the Gas Industry Seminar at Oklahoma State University, May 13, 1969.

We take judicial notice of the concerns these speeches express. *See* C. McCormick, Evidence § 328 at 704 (1954). (We

And an even more persuasive indication of the immediacy of the problem is the recent FPC Staff *Report on National Gas Supply and Demand*, issued October 1, 1969, which concludes that "only a few years remain before demand will outrun supply."[99]

The Staff Report is, at least from appearances, a careful, considered document. The record in this case does disclose instances in which Staff has been egregiously, in error,[100] but we think there is something to its supply and demand report. The report is based upon quantitative projections of demand and several indicia of supply — precisely the kind of "assessment of consequences" that we find lacking in the Commission's decision here. Demands for Southern Louisiana's gas, according to the Staff report, will be double its 1969 level in 1975. The FP ratio will remain below 1.0. The RP ratio will decline below 11 by 1973 even under the best of circumstances, and there is nothing that can be done at this time to maintain the ratio at its present level. The report further argues, and argues persuasively, that the inevitable decline in the RP ratio will probably cause regional supply deficiencies to come into existence as early as 1973.[101] And

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do not, of course, take judicial notice of the specific facts they state for the purpose of resolving contested issues. *Id.*)

[99] *Staff Report* at 1.

[100] *See* note 91 *supra* (Econometric studies).

[101] A critical ratio will ultimately be reached in each area below which the RP ratio cannot be decreased, meaning that at that point production cannot be increased without reserve additions, according to the Staff Report. But reserve levels at any given time are determined by previous levels of exploration, and there is a lag before new exploration results in addition of usable reserves. Staff has calculated the critical RP ratio for Southern Louisiana at approximately 8. It has projected the

aside from probable short-term deficiencies that cannot be prevented, Staff concludes that "[a] major new government-industry program is needed immediately to insure the continued growth of natural gas service during the next decade."[102]

The projection in the Report focuses on the next five years, and Staff announces its intention to update it at five-year intervals, but some predictions are made for longer terms. It is not too early to begin considering the effect of present gas use on our resources in the far future.[103] The Staff Report, if it is correct,

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future of the RP ratio and determined that the critical level will be reached about 1973 or 1974 under a "business as usual" regulatory program. At that time production, having kept up with demand, will not be capable of being increased, and deficiencies will come about which production from other areas will not be able to pick up because of lack of delivery lines and because they will be approaching the critical ratio. *See Staff Report* at 14-17.

[102] *Staff Report* at 4.

[103] The supply of natural gas is, of course, ultimately limited not by exploration but by the amount of recoverable reserves. The Potential Gas Committee, a group of experts from all segments of the gas industry, has recently estimated the total recoverable reserves in and offshore to the United States and Alaska at 1,227 trillion cubic feet, divided into probable supply, possible supply, and speculative supply. Consumption in 1968 was 19 trillion cubic feet. Address by Commissioner O'Connor, *supra* note 98. In other words, production for something over sixty years would exhaust this estimated supply even at present levels. The situation is aggravated by (1) growing demand and (2) increasing difficulty of finding reserves as one goes from probable to speculative supply areas. *See* Terry, Future Life of the Natural Gas Industry, in Economics of the Gas Industry 275 (Southwest Legal Foundation ed. 1962). Of course, supply from other countries, pipelined in or brought in as liquid (LNG,), synthetic gas and other sources, could have an impact on this problem. Staff Report at 47-76. Farsighted gas regulation, however, would take into account

shows that unavoidable gas supply problems in the near future, the middle future, and the far future are not only possible but probable.[104] This prospect needs only to be considered against the huge and growing importance of natural gas in this nation's energy mix.

(3) Disposition of the Supply Problem at this Stage of Review

The possibility of severe gas shortages, together with the Commission's failure to make thorough findings on the matter, present by far the most important and most difficult question in this case. We have serious misgivings about affirming the Commission. Nonetheless, after having considered all factors we find relevant, we have determined that affirmance is the best course.

First, reversal or even a limited remand would serve little purpose in this case. We think our opinion, and indeed probably the circumstances themselves, will notify the Commission that it cannot in the future set prices by cost considered in a vacuum. The Commission has itself recognized the possibility that its prior orders were inadequate and has set new proceedings that will consider precisely the questions troubling us and may well modify the entire scheme here reviewed. If there is a need to do so, the Com-

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the rational development of this depletable supply, perhaps even to the extent of having that development influence present area rates. *See* note 121 *infra*.

[104] Staff Report at 19 (graph showing supply, demand, and deficiency projections into the late 1980's).

mission may, and has in part, set aside the present order pending further determination. The long and the short of it is that the Federal Power Commission is vested with the responsibility to make certain that the gas industry serves the public interest, and insofar as we can tell it would perform this function equally competently whether we affirmed this case or reversed it. Indeed, if immediate action is called for here, we think a reversal in this case would unduly interfere with the Commission's performance.

Secondly, we can understand the circumstances that led to the Commission's order, and we are not sure that its making thorough findings in the instant case would have avoided entirely the possibilities that Staff has raised. It is certain, for example, that Staff did not communicate these possibilities to the Commission in any coherent way during the consideration of this case; in fact, Staff appears to have made major errors that would have aggravated the situation except for the Commission's refusal to adopt them.[105] Furthermore, the producers, who are possessed of most of the information essential to effective regulation, have not always actually advanced the goal of effective regulation. All in all, indications that supply deficiencies are probable were not clearly so clear at the time of the decision we are reviewing as Staff makes them seem now. Certainly, the Commission is now as aware of this new information as we are. We therefore think it appropriate, rather than inspecting the Commission's de-

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[105] *See* notes 39, 91 *supra* (concerning econometric studies and rate of return).

cision by hindsight, to allow the Commission to proceed with its new hearings with the benefit of the new information that has been presented to us.

Thirdly, this Court cannot itself evaluate the supply situation or determine what action is needed. We do not know whether the information that has reached us is correct or not. Staff states that, "For purposes of this report we have accepted at face value all industry-furnished data. Our conclusions must therefore be weighed against the assumed accuracy of our data base."[106] It also states that it is setting forth only one of several possible forecasts, albeit it is the one it thinks most probable. Clearly, even if immediate, decisive action is needed, this Court cannot take it. Since we have concluded that the Commission is on the right course now, our best course is to keep within the proper sphere of a reviewing court. The point is that the probability of shortage based on new evidence is not before us for review; all that is before us is the legal adequacy, and not the wisdom, of the Commission's orders.

Finally, and most importantly, in light of *Permian* we think we are required to hold that the Commission's orders in this case are procedurally and substantively adequate under the law. Whether they are ultimately wise is a question to be presented not to this Court but to the Commission. In *Permian*, the Supreme Court affirmed the Commission on a record similar to the one we have before us. It reversed

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[106]Staff Report at 2-3.

the Tenth Circuit, which expressed concerns similar to ours. It is true that in sustaining the Commission, the Court indicated that it expected the Commission to perform its procedural duty of fact finding better in the future. We do not think that a great deal of improvement can be expected over the Commission's *Permian* opinion, however, since hearings in this case had been going on for seven years when the Supreme Court issued its opinion, and the decision here came out a few months after that decision. Proceedings over those seven years inevitably caused the Commission to focus on certain issues to the exclusion of others. In other words, we think that the "experiment" doctrine of *Permian* is still relevant to our evaluation of the legal sufficiency of the Commission's efforts. It should be added that the Commission has responded to the difficult task mandated by the *Phillips* and *CATCO* cases by creating a regulatory procedure that is at least potentially workable, and that in itself is no mean accomplishment.[107]

At the same time, we emphasize that our affirmance should not be taken in any manner as a judgment that the supply problem is not serious enough to require immediate modification of the order herein sustained. We do not reach this question. It is possible that the Commission may find it advisable to make such an immediate modification or that it might set aside the order affirmed here. The Commission has power to take these actions if it finds them appropriate. We can only reiterate our concern over what we consider to

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[107] *See* notes 5-13 *supra*.

be strong evidence that a supply deficiency is imminent, but we think it especially important, at this uncertain time, to resist hasty action and to place some degree of faith in the body to which Congress has entrusted this question.

IV. CONCLUSIONS AND RECOMMENDATIONS

Throughout this discussion, we have been forced to navigate between the Scylla of disobeying *Permian* and the Charybdis of condoning inadequate Commission findings in the face of a possible supply deficiency. We think *Permian* requires affirmance. However, we are disturbed by what we consider to be excessive reliance by the Commission upon the mere *result* of the *Permian* decision.[108] This reliance shows that the Commission has not read *Permian* carefully enough. At numerous points in its opinion, the Supreme Court indicated that it was affirming the Commission on an inadequate record and that it was doing so only because area rate proceedings were new. Here, we think it appropriate to place a greater emphasis on the ways in which we hope the Commission will do better.

The most serious problem, as we have said, is that of possible supply deficiencies, together with the cor-

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[108] As we have previously stated, reliance on *Permian* is justified by the "experiment doctrine." The case had been commenced seven years before *Permian* and the Commission's opinion issued five months after *Permian*. Nevertheless, we think some deference to the expectations of the Supreme Court would have been appropriate, if only to show the Commission's awareness of them, especially in light of the advance warning given by the opinion of the Tenth Circuit.

relative failure of the Commission to consider supply and demand. Our discussion of the issues should be understood in light of this order of importance.

A. *Needed Improvements in the Commission's Presentation of Cases for Review*

(1) Identification and Explanation of Rate Components

As the Supreme Court stated in *Permian*, "we would expect that the Commission will hereafter indicate more precisely the method by which it intends to proceed."[109] In computing costs, as we have stated, we think the Commission has adequately explained its findings. It should be more precise, however, about its noncost elements and the reasons for their use. Noncost elements influencing a cost-based rate should be clearly labelled as such and their basis explained as specifically as possible.[110] Non-cost factors may be used to influence market variables such as supply and demand, to create price stability, to influence industry structure, to simplify a rate schedule, and for many

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[109] 390 U.S. at 800, 88 S. Ct. at 1377. The Supreme Court had difficulties similar to ours with noncost elements. 390 U.S. at 815, 88 S.Ct. at 1385 n. 97. The Court charitably observed that "the Commission's exposition of these questions might have been more carefully drawn."

[110] It should not be possible, for example, for a party on appeal to characterize a noncost element as a "phantom" tax allowance. The characterization in this case is absurd, but the possibility for it arose as a result of the Commission's timid treatment of the matter. *See* note 43 *supra*. It would be far better if both courts and parties got down immediately to the real issue — whether the noncost element can be justified.

other purposes,[111] but only if they are clearly identified and explained. If the Commission approaches these matters forthrightly, it can expect a reviewing court to give great deference to its expertise, even when it ventures into new territory.

(2) Assessment of Consequences upon the Industry.

We have already cited the Supreme Court's language calling for more specific assessment of consequences upon the industry. This assessment should encompass the following three variables, among others: (1) The character and number of individual enterprises that will remain when the order has had its effect (i.e., industry structure); (2) the capital actually available to the industry as a whole; and (3) most importantly, the industry's probable conduct and performance as a result of the order.

Maintenance of a healthy industry structure is an important FPC responsibility.[112] We have heard producer complaints that the use of unexamined average costs will prevent large segments of the industry from recouping investment and will lead to greater con-

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[111] *See* 390 U.S. at 815, 88 S. Ct. at 1385, nn. 97-99 and authorities therein cited.

[112] The natural gas industry, even though regulated, is subject to antitrust legislation, and the policies of that legislation should not conflict with the impact of the rate order. If a significant decline in the number of competitors appeared probable, it would be a matter of concern in antitrust law even in a large, fragmented market. *See United States v. Von's Grocery Co.*, 1966, 384 U.S. 270, 86 S. Ct. 1478, 16 L.Ed.2d 555.

centration in the industry, particularly since small producers as a class are subject to higher risks than large ones. We do not know whether this dire prediction represents truth or an overactive imagination, and more importantly we cannot tell from the Commission's opinion whether it knows.[113] The Commission could have cleared up the problem by a few simple findings that should have been a part of its determination — findings as to the approximate number of producers, if any, who might abandon business as a result of the rates as set and as to the subsequent degree of concentration in the industry. If concentration is increasing, the increase should be justified in terms of the public interest.

As to the crucial issue of sources for adequate financing, the Commission's findings, and for that matter the evidence, are almost nonexistent. The Commission has made only conclusionary statements to the effect that capital from outside sources will be available at the rate it has set. This is a tenuous basis for our affirmance. Another court reviewing a regula-

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[113] In this connection, the Commission might well consider the recommendations of Mr. Justice Douglas in *Permian* rather than emphasizing, as it has in its brief, that his was a "solitary" dissent. The use of average costs without examination of results troubled him and troubles us. We agree, as did Justice Douglas, that the Commission may certainly *use* average costs, but it should make some finding of effects so that it will be sure that their use is in the public interest. The majority opinion in *Permian* is authority for the proposition that the Commission does not have to make the assessment Justice Douglas would have required, but the making of that assessment would by no means be incompatible with the majority opinion and would be in the public interest. *Cf.* notes 77-80 *supra* and accompanying text.

tory commission stated, with regard to adequate financing, that a commission must make

> inquiries and findings - judgmental as the latter may often be because ratemakers must be prophets of the future as well as historians of the past - into such things as the capital programs in prospect, what such programs entail in terms of down-payments as well as financing, the cost of borrowing money, working capital needs, the desirable ratio of debt to equity, the incentives required by a stockholder to keep his money in the business and the dividends and growth rates requisite to supply these incentives, the opportunities in these respects provided in comparable businesses, and the related matters which must be prayerfully explored by the conscientious regulator before he can begin to say why he fixed upon 4.87 rather than 6.5 or 3.2.[114]

The Commission has considered few of these matters in this case either prayerfully or otherwise, and this deficiency is of great concern to a reviewing court.

With regard to conduct and performance, the Commission must assess how circumstances other than structure and capital will affect the orderly development of the industry. These concerns necessarily involve some consideration of supply and demand, which is the subject we consider next.

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[114] *D.C. Transit System, Inc. v. Washington Metropolitan Area Transit Comm.*, D. C. Cir. 1965, 350 F.2d 928.

(3) Findings as to Market Variables: Supply and Demand

The Commission must discuss the effect its order will have upon the ability of the gas industry to serve its market. There is no doubt that the Commission has the power to set prices on the basis of cost and that market variables do not necessarily have to influence the calculation, but it must examine even a cost-computed rate against the ultimate statutory purposes it is supposed to be carrying out. This is not a novel proposition. A classic statement of it appears in *Colorado Interstate Gas Co. v. FPC*, written in 1945:

> Far-sighted gas-rate regulation will concern itself with the present and future, rather than with the past, as the rate-base formula does. It will take account of conditions and trends at the source of the supply being regulated. It will use price as a tool to bring goods to market — to obtain for the public service the needed amount of gas. Once a price is reached that will do that, there is no legal or economic reason to go higher and any rate above one that will perform this function is unwarranted. * * * On the other hand, if the supply is not too plentiful and the price is not sufficient incentive to exploit it and fails to bring forth the quantity needed, the price is unwisely low, even if it does square perfectly with somebody's idea of return on a "rate base."[115]

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[115] 324 U.S. 581, 612, 65 S. Ct. 829, 843, 89 L.Ed. 1206 (concurring opinion of Mr. Justice Jackson)

In *Permian*, the Supreme Court stated that the Commission would be expected in the future to explain "the purposes for which it has chosen to act."[116]

From the Commission's findings we cannot know whether the demand for Southern Louisiana's gas is going to double, sextuple, or increase tenfold over the next decade, or whether it is going to remain stable or even decline. From data as to past demand, we have a fair idea that if current conditions hold it will grow at about five percent a year.[117] Predictions along this line are subject to obvious infirmities, but at least the possibilities can be identified and probabilities assigned to them.

Such predictions are necessary because the supply of natural gas must be considered in light of demand. Some areas are more promising than others. The Commission appears to assume, without so stating, that a rate that gives adequate return will elicit enough drilling to satisfy future demand even though some reservoirs are harder to find, but we find somewhat more persuasive the producers' argument that producers will meet demand only if there are enough reservoirs

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[116] 390 U.S. at 792, 88 S. Ct. at 1373. We interpret "the purposes for which it has chosen to act" to mean the conduct and level of performance, or other characteristics, that the Commission is trying to elicit from the regulated industry, and the public interest that it is trying to further thereby.

[117] *See* Staff Report at 11 (chart showing past and projected production). Staff forecasts about six percent.

that promise sufficient return at the rate set.[118] The Commission should make findings as to the increased difficulty of finding greater volumes of gas.[119] From this finding, it should estimate the supply that a given rate will elicit.[120]

We do not mean to imply that the Commission must set rates according to supply and demand. In a situation where the market leads to excessive prices, that would of course be self-defeating. We do not think even that the Commission is necessarily bound, as the producers contend, to set rates that will "satisfy" demand; demand is itself a function of rates, and there might be good reason for not matching it to supply.[121]

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[118]This proposition, we think, is a logical corollary of the proposition that cost pricing is ultimately circular. *See* notes 48-49, 91 *supra*. If present demand is satisfied at a price at which only promising areas are explored, there is no assurance that the same price will cause higher demand to be satisfied. Indeed, there is assurance that it will not if increased production requires exploration of less promising (i.e., more expensive) areas, because entrepreneurs will not explore those areas.

The Commission has found that there are huge virgin areas in Southern Louisiana "untouched by the drill," but this finding, without more, does not show that these areas will be developed to satisfy increasing demand *at the price set*.

[119]In particular, it should make predictions as to the probability of an anomaly in the supply-demand relationship, such as the imminent reaching of a critical ratio. *See Staff Report* at 15.

[120]We are well aware that the producers have not helped the Commission to make this prediction. *See* 4 Joint Appendix, pt. 1, at 885d. Nevertheless, it is the Commission's *responsibility* to make a prediction of this nature as best it can. Indeed, we think the process of area regulation is only as good as are numerous such forecasts made by the Commission, either tacitly or expressly. We would prefer they be express.

[121]For example, the Commission has power to curtail wasteful uses of natural gas. FPC v. Transcontinental Gas Pipe Line Co., 1961, 365 U.S. 1, 81 S. Ct. 435, 5 L. Ed.2d 377. Besides using

All that we are holding is that the Commission must explain the relationship between the level of service, the demand for service, and the price it sets. A reviewing court contemplating the "end result" test cannot in good conscience affirm the Commission unless it knows what the Commission is trying to do.

In evaluating its rate, then, the Commission should go through the following three steps relating to industry performance. It should first estimate the needs of consumer service — in this case, the demand for gas. Next, it should use this determination to fix the level of service at which it is aiming, explaining how that level is related to actual demand in the event demand is not to be fully satisfied. It must then make findings, as specifically as possible, as to how the rate it has set will affect the industry's tendency to meet that level of service. This last step means estimating the gas supply that the rate will bring forth. These are difficult matters to predict, but that is more reason why a reviewing court should not be required to guess at them. More importantly, if the Commission sets a rate on a cost basis and does not itself consider these questions carefully, its conclusionary statements to the effect that the rate is adequate or that there will probably be no need for changes in the future (these are statements that the Commission has made here) amount only to so much whistling in the dark.

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price as a tool to elicit supply, we think it probably has power to use it to provide for the orderly consumption of limited reserves. *Cf.* note 103 *supra*.

(4) Reconciliation of Conflicting Statements

Consistency is the hobgoblin of small minds, and we have tried to avoid undue concern when we have found implications in the Commission's findings to be in conflict with each other.[122] The Supreme Court faced the same problem in *Permian* and commented upon it.[123] We think, however, that the Commission ought at least to recognize inconsistencies and explain why they are present. Unexplained, they cause the efforts of a reviewing court to be wastefully consumed.

B. *Disposition of the Case*

The orders of the Commission are sustained in full. The mandate of this Court should not, however, be interpreted to interfere with Commission action that would change the rates we have approved here. We specifically and emphatically reject the contention advanced by the MGD that the Commission has no power to set aside rates once determined by it to be just and reasonable when it has reason to believe its

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[122] We have had difficulty, for example, with the Commission's categorical elimination of the FP ratio from consideration as compared with its use of the FP ratio to calculate new-gas exploration costs. 4 Joint Appendix, pt. 1, at 529d, 546d. The latter reflects either arbitrary, intentionally circular pricing or a judgment that preserving a certain FP ratio does matter. This is an example of a conflict whose resolution would go to the very heart of our doubts about this case. *See also* notes 50-51 *supra*.

[123] *See, e.g.*, 390 U.S. at 815, 88 S.Ct. at 1385 nn. 97-98

determinations may have been erroneous.[124] In fact, the existence of the new proceedings, which as we understand them will take into account many of the issues whose absence has concerned us here, has been one of the factors we have considered in deciding to affirm the Commission's decisions.

It remains for us to consider the stay ordered by this Court when this appeal began, which has to date prevented the Commission's decision from going into effect. We have determined that, subject to the usual extensions provided by Rule 41, F.R.A.P., for petitions for rehearing and certiorari, the stay should be dissolved unless further ordered. This determination is made without prejudice, however, to the Commission's power to stay its own order or to take any other appropriate action affecting this case.

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[124] Section 16 of the Natural Gas Act, 15 U.S.C. § 717*o* (1963), gives the Commission power to "perform any and all acts, and to prescribe, issue, make, amend, *and rescind* such orders as it may find necessary or appropriate to carry out the provisions of this chapter" (emphasis added).

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 27492

SOUTHERN LOUISIANA AREA RATE CASES
AUSTRAL OIL CO., ET AL,
Petitioners,

versus

FEDERAL POWER COMMISSION,
Respondent.

Petitions for Review of Orders of the Federal Power Commission (Texas Case)

ON PETITION FOR REHEARING

(June 16, 1970)

Before THORNBERRY, COLEMAN and MORGAN, Circuit Judges.

PER CURIAM: In our original opinion, we indicated that there was new evidence of a possible impending gas supply shortage. Our affirmance of the Commission's orders is structured so as to allow the Commission great flexibility in dealing with this problem.

To this end, we indicated that the Commission had authority under section 16 of the Natural Gas Act to stay, modify or rescind any part of its order, notwithstanding our affirmance, if circumstances appearing since the issuance of the orders make a change advisable. Petitioners on rehearing, however, have argued to this Court that the Commission may exercise this power *prospectively* only; that is, petitioners argue that affirmance by this Court would preclude the Commission from reexamining revenues from gas that has already been delivered. We wish to make crystal clear the authority of the Commission in this case to reopen *any* part of its order that circumstances require be reopened. Under section 19(b) of the Natural Gas Act, this Court has the broad remedial powers that inhere in a court of equity, and pursuant to our equitable powers we make it part of the remedy in this case that the authority of the Commission to reopen any part of its orders, including those affecting revenues from gas already delivered, is left intact. The Commission can make retrospective as well as prospective adjustments in this case if it finds that it is in the public interest to do so.

At the same time, we emphasize that our judgment is an affirmance and not a remand. The appropriate place for originally considering what parts of the orders must be reopened in light of new evidence is before the Commission. It may be that the Commission will decide that the refunds it has ordered are just and reasonable or at least that their significance to the public interest is outweighed by the confusion and delay that would result from their reopening. In this event, the Com-

mission will allow its refund orders to stand as they are. Or it may be that the refunds are too burdensome in light of new evidence to be in the public interest. In that case, it is our judgment that the Commission shall have the power and the duty to remedy the situation by changing its orders.

In all other respects, the original opinion of this Court is the final disposition of this appeal.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

APPENDIX C

Sec. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into

effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase,

specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

Sec. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

Sec. 16. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules and regulations as it may find necessary or appropriate to carry out the provisions of this act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this act;

and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

Sec. 19 (b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless

there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in [former] sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, sec. 1254).

APPENDIX D

List of Additional Respondents

Alco Oil and Gas Corporation
Amerada Hess Corporation
Associated Gas Distributors, including
- Alabama Gas Corporation
- Atlanta Gas Light Company
- The Berkshire Gas Co., et al.
- The Brooklyn Union Gas Company
- Central Hudson Gas & Electric Corporation
- Consolidated Edison Company of New York, Inc.
- Delmarva Power and Light Company
- Elizabethtown Gas Company
- Long Island Lighting Company
- New Jersey Natural Gas Company
- New York State Electric & Gas Corporation
- Pennsylvania Gas and Water Company
- Philadelphia Electric Company
- Philadelphia Gas Works, Div. of UGI Corporation
- Piedmont Natural Gas Company, Inc.
- Public Service Company of North Carolina, Inc.
- Public Service Electric and Gas Company
- Rochester Gas and Electric Corporation
- South Jersey Gas Company
- UGI Corporation
- Washington Gas Light Company

Atlantic Richfield Company
Austral Oil Company, Inc. and J. Ray McDermott & Co., Inc.
Issac Arnold, et al.
Bradco Properties, Inc.
E. Cockrell, Jr.
Freeport Sulphur Company
John W. Mecom, et al.
Cabot Corporation
The California Company, a Div. of Chevron Oil Company.
Cities Service Company
Cities Service Oil Company
Continental Oil Company
Forest Oil Corporation
J. R. Frankel
Gas Gathering Corporation
General American Oil Company of Texas
General Crude Oil Company

Getty Oil Company
Gulf Oil Company
Estate of William G. Helis, a partnership
Humble Oil & Refining Company and Humble Gas Transmission Company
Hunt Oil Company, et al.
Kerr-McGee Corporation
Marathon Oil Company
Midwest Oil Corporation
Mobil Oil Corporation
Newmont Oil Company
Ocean Drilling and Exploration Company
Pan American Petroleum Corp.
Phillips Petroleum Company
Public Service Commission of the State of N. Y.
Samedan Oil Corporation
Shell Oil Company
Sohio Petroleum Company
Southern Natural Gas Company
Tennessee Gas Pipeline Company (a Division of Tenneco Inc.)
Texas Eastern Transmission Corp.
Texas Gas Transmission Corp.
Transcontinental Gas Pipe Line Corp.
Trunkline Gas Company
United Fuel Gas Company
United Gas Pipeline Company
Southwest Gas Producing Company
Sun Oil Company
The Superior Oil Company
Tenneco Oil Company
Texaco Inc.
Union Oil Company of California
Union Texas Petroleum, a Division of Allied Chemical Corporation

APPENDIX E

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 19 69

No. 27492, Et Al

SOUTHERN LOUISIANA AREA RATE CASES

AUSTRAL OIL CO., ET AL,

Petitioners,

versus

FEDERAL POWER COMMISSION,

Respondent.

Petition for Review of Orders of the Federal Power Commission (Texas Case.)

Before THORNBERRY, COLEMAN and MORGAN, Circuit Judges.

J U D G M E N T

This cause came to be heard on the petition of Austral Oil Co., Et Al, for review of orders of the Federal Power Commission in Docket No. AR 61-2 and RI 60-18, Et Al, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the orders of the Federal Power Commission in this cause be and the same are hereby affirmed.

It is further ordered that the stay ordered by this Court, subject to the usual extensions provided by Rule 41, FRAP, for petitions for rehearing and certiorari, should be dissolved unless further ordered, without prejudice, to the Commission's power to stay its own order or to take any other appropriate action affecting this case.

It is further ordered that petitioners pay to respondents, the costs on appeal to be taxed by the Clerk of this Court.

March 19, 1970

Issued As Mandate: JUL 14 1970

Getty Oil Company
Gulf Oil Company
Estate of William G. Helis, a partnership
Humble Oil & Refining Company and Humble Gas Transmission Company
Hunt Oil Company, et al.
Kerr-McGee Corporation
Marathon Oil Company
Midwest Oil Corporation
Mobil Oil Corporation
Newmont Oil Company
Ocean Drilling and Exploration Company
Pan American Petroleum Corp.
Phillips Petroleum Company
Public Service Commission of the State of N. Y.
Samedan Oil Corporation
Shell Oil Company
Sohio Petroleum Company
Southern Natural Gas Company
Tennessee Gas Pipeline Company (a Division of Tenneco Inc.)
Texas Eastern Transmission Corp.
Texas Gas Transmission Corp.
Transcontinental Gas Pipe Line Corp.
Trunkline Gas Company
United Fuel Gas Company
United Gas Pipeline Company
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Sun Oil Company
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Issued As Mandate: JUL 14 1970

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Nos. 669, ET AL.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 669

MUNICIPAL DISTRIBUTOR GROUP,
Petitioner,

v.

FEDERAL POWER COMMISSION, ET AL.,
Respondents.

No. 691

ASSOCIATED GAS DISTRIBUTORS,
Petitioners,

v.

AUSTRAL OIL COMPANY, ET AL.,
Respondents.

No. 692

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner,

v.

AMERADA HESS CORPORATION, ET AL.,
Respondents.

BRIEF OF RESPONDENT E. COCKRELL, JR. IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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October 14, 1970

FIDELITY PRINTING COMPANY, INC., HOUSTON

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PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner,

v.

AMERADA HESS CORPORATION, ET AL.,
Respondents.

BRIEF OF RESPONDENT E. COCKRELL, JR. IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

E. Cockrell, Jr. (Cockrell), a respondent in Nos. 669, 691 and 692, and petitioner in No. 684, hereby submits his brief in opposition to the petitions filed in Nos. 669, 691 and 692 for writs of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on March 19, 1970.

STATEMENT

This brief is submitted in opposition to the petitions for writs of certiorari filed by the Municipal Distributor Group (MDG), the Associated Gas Distributors (AGD) and the Public Service Commission of the State of New York (NYPSC). Those petitioners have set forth parts of the history of the case before the Commission and the Court of Appeals. In his petition filed in No. 684, Cockrell has set forth a more complete statement of this case, which such statement is not here repeated but reference is here respectfully made to the same. Those portions of that history which are most pertinent to the questions presented in Nos. 669, 691 and 692 are as follows:

In its March 19, 1970, opinion, the Court of Appeals found defect after defect in the Commission's opinions and orders under review. On the "most serious issue" involving Commission findings (or lack thereof) and legal standards — termed "the supply problem" by the court — the Court of Appeals recognized that this Court held in *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), that "adequate findings" would be required in the future, and noted that the Commission had left gaps similar to the omissions criticized by this Court in *Permian*. The Court of Appeals also specifically found ". . . the Commission failed to approach supply and demand in either a semi-quantitative or qualitative way" (Continental Appendix A, pp. 49-50),[1] and

[1] Petitioners Continental Oil Company, *et al.*, have filed in No. 689 Appendices to their Petition for Writ of Certiorari containing the complete text of opinions and judgment below, the agency opinions and orders and statutes involved. References herein to "Continental Appendix" are to that document. Petitioners Continental Oil Company, *et al.*, have also filed forty copies of the Joint Appendix in the Court of Appeals which consisted of four volumes designated as Part I and two volumes designated as Part II. A citation here to "III J.A. (1)

(Continued)

laid bare other defects in "findings" (or lack thereof) on related questions of supply, demand and actual availability of capital to the industry at rates prescribed (Continental Appendix A, pp. 52-69). The Court of Appeals also noted existence of more current data then and now available to the Commission, including the study by the Commission's own Staff released in October, 1969, indicating "perhaps a certainty, that the supply of gas is dangerously low" and that "a serious shortage, in fact, may already be unavoidable" (Continental Appendix A, p. 52). The court found that assessment of crucial facts as to supply, demand and impact of prescribed rates called for by *Permian* had not been made in this case by the Commission.

Therefore, the Court of Appeals expressed "serious misgivings about affirming the Commission" and did so only with affirmative statements that the Commission still may "set aside the present order pending further determination" (Continental Appendix A, pp. 56-57); that "affirmance" is not a "judgment that the supply problem is not serious enough to require immediate modification of the order herein sustained" (Continental Appendix A, p. 59); that "the Commission must explain the relationship between the level of service, the demand for service, and the price it sets" (Continental Appendix A, p. 68); that the "mandate" of the court should not "be interpreted to interfere with Commission action that would change the rates" (Continental Appendix A, p. 69); that, citing Section 16 of the Natural Gas Act (Act) and with emphasis supplied, the Commission had power to "rescind" its orders; and, that dissolution of the court's stay would be without prejudice to Commission power "to stay its own order or to take any

---

[1] (Continued)
62d" therefore refers to Volume III of Part I, page 62d. Such page designations appear at the bottom of each page; and pages included in each of the volumes are shown in parentheses at the bottom of the cover of each volume of that Joint Appendix.

other appropriate action affecting this case" (Continental Appendix A, p. 70).

Thereafter, petitions for rehearing raised, *inter alia*, questions of whether an "affirmance" by the Court of Appeals could leave the Commission with unimpaired powers to stay, vacate, modify or rescind its orders, as contemplated by the court. The court thereupon directed the Commission to respond to the petitions and to two specific questions concerning (i) Commission authority to stay, modify or rescind an order that has been "affirmed"; and, (ii) equitable power of the court to "affirm" while preserving Commission powers "to stay, modify or rescind" an order.[2]

In response, the Commission (i) took the position that it would not "have authority to permit any *retroactive* increases or decreases in a rate order, unless authorized to do so by a court";[3] (ii) stated that extent of the court's "equitable powers" had not been decided; and the court had "full statutory power to authorize or instruct the Commission" to "reconsider" the record or "reopen the record" for specific purposes "without necessarily reversing the Commission and vacating the order for a new hearing"; (iii) noted the need for clarification of the court's

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[2] The full text of the questions posed by the Court of Appeals to the Commission is:

"(1) Whether the Federal Power Commission has authority to stay, modify or rescind an order once that order has been affirmed by this Court, if circumstances appearing since the entry of the order seem to make these actions advisable.

"(2) Whether this Court may, in the exercise of its equitable powers, affirm an order of the Commission while preserving the authority of the Federal Power Commission to stay, modify or rescind the order if the circumstances seem to make these actions advisable."

[3] Emphasis by the Commission.

intent to authorize "retrospective adjustments" in light of its "use of the words 'sustained in full'"; and, (iv) requested a "remand" so "that the Commission can discharge its regulatory responsibilities consistent with the Court's opinion."

On June 16, 1970, the court entered its order denying the petitions for rehearing and also entered an opinion stating that "affirmance of the Commission's orders is structured so as to allow the Commission great flexibility" (Continental Appendix B, p. 1). The court stated:

> ". . . We wish to make crystal clear the authority of the Commission in this case to reopen *any* part of its order that circumstances require be reopened. Under section 19(b) of the Natural Gas Act, this Court has the broad remedial powers that inhere in a court of equity, and pursuant to our equitable powers we make it part of the remedy in this case that the authority of the Commission to reopen any part of its orders, including those affecting revenues from gas already delivered, is left intact. The Commission can make retrospective as well as prospective adjustments in this case if it finds that it is in the public interest to do so.
>
> "At the same time, we emphasize that our judgment is an affirmance and not a remand. The appropriate place for originally considering what parts of the orders must be reopened in light of new evidence is before the Commission. It may be that the Commission will decide that the refunds it has ordered are just and reasonable or at least that their significance to the public interest is outweighed by the confusion and delay that would result from their reopening. In this event, the Commission will allow its refund orders to stand as they are. Or it may be that the refunds are too burdensome in light of new evidence to be in the public interest. In that case, it is our judgment that the Commission shall have the power and the duty to remedy the situation by changing its orders.

"In all other respects, the original opinion of this Court is the final disposition of this appeal."[4]

On July 2, 1970, the Commission entered an order staying its own orders, effective upon dissolution of the Court of Appeals' stay. On July 14, 1970, the Court of Appeals issued its judgment as mandate, and the Commission stay thus is and remains in effect.

A motion presently pends before the Commission seeking (i) reopening of the proceeding in Docket No. AR61-2, (ii) consolidation of Docket No. AR61-2 with the Commission's Docket No. AR69-1 in which more current data as to natural gas demand and supply and as to related industry capital requirements have already been presented, and (iii) modification of the opinions and orders reviewed below in light of the record before the Commission in the reopened proceeding.

ARGUMENT

In the Court of Appeals, Cockrell sought express reversal of the Commission on a number of substantive issues and a remand expressly directing the Commission (i) to set aside the opinions and orders under review, (ii) to receive additional evidence, and (iii) to prescribe prices on the basis of current data as to demand, supply deficiencies and industry capital requirements. The Court of Appeals declined to grant the requested relief. Instead, the Court of Appeals adopted a disposition which would permit the Commission, in the first instance, to reconsider its opinions and orders fully, without express directives from the court, and to decide what further steps are warranted.

As set forth in Cockrell's petition in No. 684 which presently pends before this Court, it is Cockrell's position that

[4] Continental Appendix B, pp. 2-3. Emphasis by the Court.

the Court of Appeals committed reversible error in not reversing the Commission and formally remanding the case to the Commission with explicit directions to rescind the opinions and orders on review and to reconsider such opinions and orders on the basis of additional relevant and current evidence. Thus, Cockrell continues to pray for the relief sought in his petition in No. 684; however, notwithstanding the foregoing, it is Cockrell's further position that MDG, AGD and NYPSC are each in error in their assertions, *inter alia*, that the Court of Appeals lacked the power, as such, to effectively withhold finality of a judgment of affirmance and by express terms in the court's June 16, 1970, opinion permit the Commission to reconsider its opinions and orders. In the discussion *infra* with respect to the validity of such disposition by the Court of Appeals, Cockrell does not waive the contentions set forth in his petition in No. 684, but, to the contrary, relies thereon.

Although declining to expressly reverse and remand, the Court of Appeals very obviously intended to leave the Commission the capability — as sought by the Commission's request for remand — to reconsider its orders as fully as on an application for rehearing and to consider anew motions for reopening or for leave to adduce additional evidence. The Commission had already reserved as subject to its own further orders, questions as to amounts collected subject to refund prior to October 1, 1968 (Continental Appendix D, pp. 186-187), and, under the disposition by the court below, amounts collected subsequent to October 1, 1968, under the stays entered by the Court of Appeals and the Commission, likewise are subject to further Commission order.[5] Thus, should the Commission find it in the

[5] As to the general authority of the court and the agency over such funds collected and being collected subject to refund and stay orders, see *Federal Power Commission* v. *Interstate Natural Gas Co.*, 336 U.S. 577 (1949).

public interest, the Commission may retrospectively or prospectively adjust the orders on review as they relate to or control these funds.

The funds in issue thus have been, are, and remain, limited to amounts so collected under the rates at issue *in this case*. The Commission orders here involved also have not become final as a result of the express terms in the Commission's opinion cited *supra*, and orders entered by the agency and the court below. Thus, contrary to assertions by MDG, AGD and NYPSC, questions involving "reparations," collateral modification of final "filed" rates, or "retroactive" changes of final rate orders are simply not presented because of, *inter alia*, the limits on "affirmance" prescribed below in the Court of Appeals' June 16, 1970, opinion. Similarly, "retroactive" increases above rates heretofore charged, collected and received for past periods also are not involved (*cf.* MDG Petition, pp. 16-17).

I. The Court of Appeals' Disposition Under the Opinion of June 16, 1970, Was Within Its Authority Under Section 19(b) of the Natural Gas Act

MDG, AGD and NYPSC argue that the Court of Appeals' disposition is wholly beyond the court's authority under Section 19(b) of the Act (MDG Petition, pp. 19-22; AGD Petition, pp. 9-10; NYPSC Petition, pp. 16-20).[5] However, because of the express terms of the court's opinion of June 16, 1970, such argument is without merit. Although Cockrell submits that reversal and remand with express directions for rescission were and are required in this case,[6] the narrower, alternative, limited disposition on "equitable" grounds under terms of the court's June 16, 1970, opinion is not defective on the grounds of lack of power in a court

[6] See Cockrell's Petition in No. 684.

to so limit effect of its own expressions of "affirmance" of a Commission order.

MDG, AGD and NYPSC appear to argue as though there had been a final "affirmance" below without more, as though the court's opinion of March 19, 1970, stood as a final, unqualified "affirmance," and as though the express limits in the court's June 16, 1970, opinion had never been written.[7] Contrary to their arguments, however, the court did limit the effect of its March 19, 1970, opinion and holdings by designful terms in the June 16, 1970, opinion, clarifying its March 19, 1970, opinion and intentionally withholding any effects of an unqualified "judgment" of "affirmance" that might have barred required, unrestricted Commission reconsideration.

This case, therefore, simply does not present questions as to agency or judicial powers of "rescission" under Section 16 of the Act framed by MDG, or broadly drawn questions posed by MDG, by AGD and by NYPSC as to general agency powers to rescind or otherwise modify an agency order which has been affirmed without such express qualifications or limitations, as here. Section 19(b) of the Act empowers courts of appeals to "affirm, modify or set

[7] In this respect, the two questions stated by MDG, in particular, are not presented in this case (see MDG Petition, p. 1). MDG's first question is drawn as though the June 16, 1970, opinion, and express limits therein, had never been written by the Court of Appeals, and as though the court's holdings of June 16, 1970, rested upon a construction of Section 16 of the Act instead of Section 19(b) as expressly stated by the court. MDG's second question assumes the Court of Appeals held it has the power to fix rates "retroactively" and has conferred this "equitable power" upon the Commission. However, there are no such holdings below; the Court of Appeals withheld finality of its "affirmance," preserving the Commission's statutory authority to reconsider its orders; in so doing, the Court of Appeals referred to its "equitable powers" as a reviewing court under Section 19(b), not to any purported judicial authority to "reverse" rates "retroactively" (*cf.* MDG Petition, p. 3).

aside" a Commission order "in whole or in part," to order additional "evidence to be taken before the Commission . . . in such manner and upon such terms and conditions as to the court may seem proper"; and to enter stays of Commission orders. Significantly, in this instance, prior to entry of its June 16, 1970, opinion, the Court of Appeals had before it (i) renewals of motions under Section 19(b) for leave to adduce additional evidence before the Commission, (ii) petitions urging that finality of an unqualified "affirmance" must be withheld, and (iii) *the Commission's formal request for remand.* The Court of Appeals thus expressly limited its "affirmance" and made provision for continuation of stay by the agency, with the result that finality of an "affirmance" without qualification did not attach and Commission opportunity for reconsideration is preserved.

This Court has stated that authority of a Court of Appeals under a review statute similar to Section 19(b) of the Act does include "equity powers, and while the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action." *Ford Motor Company* v. *National Labor Relations Board*, 305 U.S. 364, 373 (1939). In that instance, a remand for further proceedings without reversal or setting aside of the agency order was sustained; and under similar readings, such remedies as "affirmance" coupled with express granting of motions for leave to adduce additional evidence also have been fashioned.[8]

[8] See *Hamilton-Brown Shoe Co.* v. *National Labor Relations Board*, 104 F.2d 49 (8th Cir. 1939); *Dolcin Corporation* v. *Federal Trade Commission*, 219 F.2d 742 (D.C. Cir. 1954), cert. den. 348 U.S. 981 (1955). See also *United States* v. *Brown*, 331 F.2d 362, 365 (10th Cir. 1964); *National Labor Relations Board* v. *Central Mercedita, Inc.*, 273 F.2d 370 (1st Cir. 1959).

Where a reviewing court so *expressly* fashions a remedy and so *expressly* limits its holdings, as in the June 16, 1970, opinion below, the "'. . . great principles of equity, securing complete justice, should not yield to light inferences or doubtful construction.'" *Porter* v. *Warner Holding Company*, 328 U.S. 395, 398 (1946) (citing *Brown* v. *Swann*, 10 Pet. (U.S.) 497 (1836)). See also *Arkadelphia Milling Company* v. *St. Louis Sw. Ry. Co.*, 249 U.S. 134 (1919); *United States* v. *Morgan*, 307 U.S. 183, 197 (1939). A conclusion expressed in *Ford Motor Company* v. *National Labor Relations Board, supra,* is pertinent:

> "There is nothing in the statute, or in the principles governing judicial review of administrative action, which precludes the court from giving an administrative body an opportunity to meet objections to its order by correcting irregularities in procedure, or supplying deficiencies in its record, or making additional findings where these are necessary, or supplying findings validly made in the place of those attacked as invalid." (305 U.S. at 375)

The language in the June 16, 1970, opinion harks back to a similar early reading of Section 19(b) of the Act in *Natural Gas Pipeline Co. of America* v. *Federal Power Commission*, 128 F.2d 481 (7th Cir. 1942), in which the principles of the *Ford Motor Company* case were applied:

> ". . . In this respect the legislation is similar in its terms and purport to that governing orders of the Federal Trade Commission, the National Labor Relations Board, and various other administrative bodies. We have previously said in Century Metalcraft Corporation v. Federal Trade Commission, 7 Cir., 112 F.2d 443, that, under the Federal Trade Commission Act, 15 U.S.C.A. § 41 et seq., Congress has made a grant of original jurisdiction to the court to enforce, set aside or modify the Commission's order and that such power carries with it authority to vacate or modify our own judgment whenever good cause is shown. This is in

> accord with announcements of other jurisdictions. We think it well settled that in respect to review of orders of Federal Boards and Commissions, the jurisdiction of the Circuit Court of Appeals, when granted by Congress, is original rather than appellate in character and that, being endowed with original jurisdiction, the court may by its own orders protect the rights of the parties in any manner in which any trial court of equity of general jurisdiction might do so in an injunction suit. Butterick Co. v. Federal Trade Commission, 2 Cir., 4 F.2d 910; Silver Co. v. Federal Trade Commission, 6 Cir., 292 F. 752; Chamber of Commerce v. Federal Trade Commission, 8 Cir., 13 F.2d 673; Federal Trade Commission v. Balme, 2 Cir., 23 F.2d 615, certiorari denied 277 U.S. 598, 48 S.Ct. 560, 72 L.Ed. 1007; Indiana Quartered Oak Co. v. Federal Trade Commission, 2 Cir., 58 F.2d 182." (128 F.2d at 484)

An "affirmance" without such limits, qualifications or other express definition by the reviewing court, therefore, is not presented by virtue of the opinion of June 16, 1970, in this case. While Cockrell submits that reversal and express directives were and are required, the narrower disposition below, leaving initial decision as to corrective action to the agency, was otherwise within the Court of Appeals' prerogatives under Section 19(b) of the Act. Different results compelling specific corrective Commission action are required in this case, but, nevertheless, MDG, AGD and NYPSC clearly err in asserting that the Court of Appeals was without power to so fashion the remedy explicitly provided in the court's June 16, 1970, opinion.

II. The Disposition Under the June 16, 1970, Opinion Does Not Present Conflicts With Decisions of this Court or of the Courts of Appeals

MDG, AGD and NYPSC also argue that the disposition below conflicts with holdings that (i) the Commission has

no power to award reparations, and (ii) filed rates effective by final or "affirmed" Commission action may not be set aside subsequently or collaterally (MDG Petition, pp. 16-17, 20; AGD Petition, pp. 9-10; NYPSC Petition, pp. 16-19). No such conflicts with decisions of this Court or of the Courts of Appeals are presented in light of the provisions of the court's June 16, 1970, opinion.

It is, of course, well settled that the Commission has no "reparations" powers, and that the "filed rate" principle applies under the Act.[9] It is also settled that agency orders which become final as a result of unqualified judicial affirmance, or otherwise by operation of law, generally are not subject to retroactive change or collateral modification.[10] In this case, however, no conflict with these constructions or principles results by virtue of the express, considered, terms of the June 16, 1970, opinion. As shown *supra*, the rates in issue have not become "final," and neither "reparations" nor "retroactive" ratemaking are thus involved.

Thus, the rates in issue in this case have never become "final" filed rates or otherwise made the "legal rate" by Commission action no longer subject to Commission reconsideration under Section 19(b) or judicial review under Section 19(b), in the sense these terms are used in cases cited by MDG, AGD and NYPSC.

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[9] As to these constructions, MDG, AGD and NYPSC correctly cite *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944); *Federal Power Commission* v. *Sunray DX Oil Co.*, 391 U.S. 9 (1968); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951); *State Corporation Commission of Kansas* v. *Federal Power Commission*, 215 F.2d 176 (8th Cir. 1954). See also *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe R. Co.*, 284 U.S. 370 (1932).

[10] As to these principles, MDG, AGD and NYPSC correctly cite *International Union* v. *Eagle-Picher M. & S. Co.*, 325 U.S. 335 (1945); *Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958).

Asserted "conflicts" claimed by MDG, AGD and NYPSC, therefore, are not existent in light of the express terms of the court's order, which such terms preclude the result now claimed by such petitioners. The possible appearance of "conflict" in holdings was thereby deliberately and intentionally removed by the court below in terms qualifying its affirmance, withholding finality and otherwise precluding any operative effect of its judgment impairing Commission reconsideration of the opinions and orders on review. The questions of conflicts posed by MDG, AGD and NYPSC thus would only properly arise if the June 16, 1970, opinion had not been entered by the Court of Appeals.

III. NYPSC Does Not Present A Substantial Question Involving Commission Prescription of Area Rates

NYPSC sets forth a question concerning alleged "cushions" raising the "rate of return" (NYPSC Petition, p. 3, pp. 20-21). Such question actually pertains to a portion of the Commission's opinion involving rate design which was sustained below as fully supported by substantial evidence and required findings, and as consistent with the area rate methodology affirmed by this Court in *Permian*. The question, therefore, presents no issue involving conflict with opinions of this Court, of the Court of Appeals for the District of Columbia Circuit or of any other court; and the question does not warrant review here on any ground asserted by NYPSC.

In *Permian*, this Court sustained Commission use of "non-cost" economic factors in prescribing "area rates," particularly if there were known imperfections or other recognized deficiencies in any "cost" data used. See *Permian Basin Area Rate Cases*, 390 U.S. 747, 791, 815 (1968). These and other steps in the Commission's methodology do not

involve "cushions," "bonuses" or "boosts" of the "rate of return" despite NYPSC's artful labeling. As correctly found below (Continental Appendix A, pp. 27-28, footnotes omitted):

> "Even if we were to construe this case [the *Williams* case cited by NYPSC] as broadly disapproving noncost elements, the application to the sprawling, wildcatting gas producing industry of principles developed in regulating bus and telephone companies would require major adjustments. But this is not the extent of our disagreement with the argument advanced by these intervening parties. We do not understand the law of industry regulation, including the Williams case, to prohibit noncost elements that are based upon appropriate grounds. In *Permian*, the Supreme Court unequivocally stated that the FPC is not bound by the sum of cost and return even if it adopts costs as the primary basis of its calculations. The most persuasive reason for this rule is that cost pricing is circular. Past production has taken place at a given level; if a regulatory body fixes prospective prices at the cost of that production, it may be freezing the level of production, too. We think that the need for dramatically increased production from Southern Louisiana justifies the noncost factors added here, and that the FPC has power to include noncost elements that reflect its assessment of the need to use price as a tool to influence such economic relations. These are propositions that apply generally to regulation of utilities and quasi-utilities."

The court below also disposed of each of NYPSC's specific arguments by reference to the Commission's findings and the record. Repetition of the same arguments here does not present an issue differing from questions disposed of by *Permian* or now warranting another review by this Court.

IV. Disposition Under the Opinion of June 16, 1970, Permits A Result Consistent With the Public Interest and Commission Responsibility for Natural Gas Supply

MDG, AGD and NYPSC each argue, with differing language and emphasis, that Commission reconsideration under the Court of Appeals' opinion of June 16, 1970, necessarily is, or may produce results, contrary to the public interest and the Act's standards (MDG Petition, pp. 13-14, 20-22; AGD Petition, pp. 7-8; NYPSC Petition, pp. 14-15, 17-20). This is not correct. Commission reconsideration and corrective action are urgently required;[11] and, in any event, the disposition below permits the responsible regulatory agency to consider the relevant facts now available and make the determinations in the first instance which now vitally affect current and future area and national gas supply.

Numerous documents presented below and in this Court emphasize facts emergent since 1968 reflecting a present critical shortage of natural gas.[12] A chain relationship is involved, requiring reference to demand, supply, exploratory efforts, capital required and capital actually available under the Commission's 1968 orders. The court below correctly recognized that the Commission should be the body to initially reassess these relationships. Before funds are dissipated under the orders of 1968 to pipeline companies and thence to AGD, MDG and other corporations or local government bodies not subject to the Commission's jurisdiction, the Commission thus is charged by the court with reconsidering those orders in light of new facts reflecting supply deficiencies and declining exploration, development and capital now required for exploration and production.

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[11] See Cockrell's Petition in No. 684.

[12] See, e.g., Appendices to Petition of The California Company in No. 682.

The nature, size, cause and cure for a supply shortage and for rising capital needs also were not decided by the court below. That court correctly recognized that the interests of all affected parties, *and the public interest,* will be best served if the Commission is afforded the opportunity for reassessment of these facts before funds are paid over and passed on to AGD and MDG.

It is clear that neither MDG, nor AGD, nor NYPSC can conclusively argue or show that rates or "refunds" based on findings concerning stale data, obsolete assumptions and misconceptions of a plentiful gas supply are in "the public interest." The public interest in, and the Commission's responsibility for, an existent natural gas supply for consumers, as underscored in *Permian,* are inextricably intertwined, as recognized by the court below. As to the supply shortage and any related required modifications of the Commission's 1968 orders, the court declined to accept the *ipse dixit* of any of the parties as conclusive, but called for assessment by the administrative agency in the first instance. That assessment must be permitted (and required, if need be), and is, in and of itself, a step that is in the public interest.

As to the relevant facts that should now control prescription of area rates, the court below also left these for further (and new) agency findings. Neverthelsss, MDG, AGD and NYPSC call for a pretense that economic conditions of 1956, or even 1960, now exist as to demand, supply and capital requirements. Their arguments are presented without regard for the gas supply situation described by a unanimous Federal Power Commission as recently as September 18, 1970, in a decision in the *Hugoton-Anadarko Area Rate Proceeding,* FPC Docket No. AR64-1 (FPC Opinion No. 586, pp. 19-20, mimeo. ed.):

"In determining area rates we have been charged by the Court of Appeals for the Fifth Circuit with predicting the probable demand for gas, determining the desired level of supply and attempting to determine a price which will elicit that level of supply. *Southern Louisiana Area Rate Cases, supra.* The court noted that this task was difficult, but said it must nevertheless be attempted by the Commission.

"All major sources of energy in the United States are currently in short supply. Brown-outs have already occurred in some electric utility distribution areas. Restrictions on gas use have been imposed by distributors in a number of areas and are being considered in others. The stock-pile reserves of coal for electric utilities are below the level considered by the industry to be a safe operating margin. The installation of nuclear power plants has progressed more slowly than was forecast and it now appears that nuclear power will not be able to ease the increasing demand on fossil fuel for many years. Domestic oil reserves are declining. Low-sulphur coal and oil are in short supply. Desulphurization facilities are lagging behind projected demand to meet stringent air pollution standards, destined to grow more stringent in several major urban areas. Pipelines are unable to obtain the desired supplies of natural gas. In 1968, according to the statistics of the AGA, the national findings of natural gas fell below production. This occurred again to a greater degree in 1969, when only about 8.3 trillion cubic feet were added to reserves while production mounted to 20.6 trillion."

In the present case, an area supplying up to one-third of the nation's natural gas supply is involved, and, as petitioners say, "huge sums" also are involved. The critical situation recognized below was that the public interest now calls for Commission reconsideration of its 1968 orders, and reassessment of any dissipation of funds detrimental to exploratory efforts and area and national natural gas supply. It will be only after Commission reconsideration

and reassessment that any party (or court) can allege that the ultimate result is or is not in the public interest. Such Commission reassessment must be permitted, rather than thwarted as sought by MDG, AGD and NYPSC.

V. If the Disposition Under Its Opinion of June 16, 1970, Was Beyond the Power of the Court of Appeals, Then the Court of Appeals Should Be Given the Opportunity or Required to Reconsider Its "Affirmance"

As discussed *supra,* the Court of Appeals "affirmed" the Commission with express "misgivings" and on the assumption the Commission could and would reconsider its opinions and orders in the light of (i) deficiencies enumerated by the court, and (ii) the Commission's expressions of concern over gas supply. Thus, although "affirming" the opinions and orders under review, the Court of Appeals attempted to fashion a remedy leaving the Commission free to take such corrective steps as present circumstances and facts dictate, including rescission of the deficient opinions and orders.

If the "remedy" fixed by the Court of Appeals is *not* available as a matter of law, then the "affirmance" by the Court of Appeals resulted from and rests upon serious misinterpretation of the Act as to Commission powers to act despite the "affirmance." In view of the present gas supply emergency recognized by almost all of the parties below, if this Court (i) determines that the court below erred in its "remedy," (ii) and also does not reverse the erroneous opinions and orders of the Commission and the "affirmance" thereof, then this Court should (i) summarily remand this case to the Court of Appeals with instructions to direct the Commission to reopen the case and, after further proceedings and reconsideration and reassessment, enter such

orders as the Commission may deem to be in the public interest or, in the alternative, (ii) remand the case to the Court of Appeals with instructions to the court to reconsider its judgment in the light of this Court's finding that the "remedy" directed by the Court of Appeals is not available as a matter of law.

CONCLUSION

For the foregoing reasons, the petitions in Nos. 669, 691 and 692 should be denied.

Respectfully submitted,

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October 14, 1970

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Nos. 669, ET AL.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 669

MUNICIPAL DISTRIBUTOR GROUP,
Petitioner,

v.

FEDERAL POWER COMMISSION, ET AL.,
Respondents.

No. 691

ASSOCIATED GAS DISTRIBUTORS,
Petitioners,

v.

AUSTRAL OIL COMPANY, ET AL.,
Respondents.

No. 692

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner,

v.

AMERADA HESS CORPORATION, ET AL.,
Respondents.

BRIEF OF RESPONDENTS BRADCO PROPERTIES, INC., et al., IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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October 14, 1970

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Nos. 669, et al.

In The

Supreme Court of the United States

October Term, 1970

No. 669

Municipal Distributor Group,
Petitioner.

v.

Federal Power Commission, et al.,
Respondents.

No. 691

Associated Gas Distributors,
Petitioners.

v.

Austral Oil Company, et al.,
Respondents.

No. 692

Public Service Commission of the State of New York,
Petitioner.

v.

Amerada Hess Corporation, et al.,
Respondents.

BRIEF OF RESPONDENTS BRADCO PROPERTIES, INC., et al., IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

Bradco Properties, Inc., Freeport Sulphur Company, John W. Mecom, Lake Washington Inc., U. S. Oil of Louisiana Inc. and U. S. Oil of Louisiana, Ltd. (Bradco, *et al.*), respondents in Nos. 669, 691 and 692, and petitioners in No. 683, hereby submit their brief in opposition to the petitions filed in Nos. 669, 691 and 692 for writs of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on March 19, 1970.

STATEMENT

This brief is submitted in opposition to the petitions for writs of certiorari filed by the Municipal Distributor Group (MDG), the Associated Gas Distributors (AGD) and the Public Service Commission of the State of New York (NYPSC). Those petitioners have set forth parts of the history of the case before the Commission and the Court of Appeals. In their petition filed in No. 683, Bradco, *et al.*, have set forth a more complete statement of this case, which such statement is not here repeated but reference is here respectfully made to the same. Those portions of that history which are most pertinent to the questions presented in Nos. 668, 691 and 692 are as follows:

In its March 19, 1970, opinion, the Court of Appeals found defect after defect in the Commission's opinions and orders under review. On the "most serious issue" involving Commission findings (or lack thereof) and legal standards — termed "the supply problem" by the court — the Court of Appeals recognized that this Court held in *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), that "adequate findings" would be required in the future, and noted that the Commission had left gaps similar to the omissions criticized by this Court in *Permian*. The Court of Appeals also specifically found ". . . the Commission failed to approach supply and demand in either a semi-quantitative or qualitative way" (Continental Appendix A, pp. 49-50),[1] and

[1] Petitioners Continental Oil Company, *et al.*, have filed in No. 669 Appendices to their Petition for Writ of Certiorari containing the complete text of opinions and judgment below, the agency opinions and orders and statutes involved. References herein to "Continental Appendix" are to that document. Petitioners Continental Oil Company, *et al.*, have also filed forty copies of the Joint Appendix in the Court of Appeals which consisted of four volumes designated as Part I and two volumes designated as Part II. A citation here to "III J.A. (1)

(Continued)

laid bare other defects in "findings" (or lack thereof) on related questions of supply, demand and actual availability of capital to the industry at rates prescribed (Continental Appendix A, pp. 52-69). The Court of Appeals also noted existence of more current data then and now available to the Commission, including the study by the Commission's own Staff released in October, 1969, indicating "perhaps a certainty, that the supply of gas is dangerously low" and that "a serious shortage, in fact, may already be unavoidable" (Continental Appendix A, p. 52). The court found that assessment of crucial facts as to supply, demand and impact of prescribed rates called for by *Permian* had not been made in this case by the Commission.

Therefore, the Court of Appeals expressed "serious misgivings about affirming the Commission" and did so only with affirmative statements that the Commission still may "set aside the present order pending further determination" (Continental Appendix A, pp. 56-57); that "affirmance" is not a "judgment that the supply problem is not serious enough to require immediate modification of the order herein sustained" (Continental Appendix A, p. 59); that "the Commission must explain the relationship between the level of service, the demand for service, and the price it sets" (Continental Appendix A, p. 68); that the "mandate" of the court should not "be interpreted to interfere with Commission action that would change the rates" (Continental Appendix A, p. 69); that, citing Section 16 of the Natural Gas Act (Act) and with emphasis supplied, the Commission had power to "rescind" its orders; and, that dissolution of the court's stay would be without prejudice to Commission power "to stay its own order or to take any

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[1] (Continued)
62d" therefore refers to Volume III of Part I, page 62d. Such page designations appear at the bottom of each page, and pages included in each of the volumes are shown in parentheses at the bottom of the cover of each volume of that Joint Appendix.

other appropriate action affecting this case" (Continental Appendix A, p. 70).

Thereafter, petitions for rehearing raised, *inter alia*, questions of whether an "affirmance" by the Court of Appeals could leave the Commission with unimpaired powers to stay, vacate, modify or rescind its orders, as contemplated by the court. The court thereupon directed the Commission to respond to the petitions and to two specific questions concerning (i) Commission authority to stay, modify or rescind an order that has been "affirmed"; and, (ii) equitable power of the court to "affirm" while preserving Commission powers "to stay, modify or rescind" an order.[2]

In response, the Commission (i) took the position that it would not "have authority to permit any *retroactive* increases or decreases in a rate order, unless authorized to do so by a court";[3] (ii) stated that extent of the court's "equitable powers" had not been decided, and the court had "full statutory power to authorize or instruct the Commission" to "reconsider" the record or "reopen the record" for specific purposes "without necessarily reversing the Commission and vacating the order for a new hearing"; (iii) noted the need for clarification of the court's

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[2] The full text of the questions posed by the Court of Appeals to the Commission is:

"(1) Whether the Federal Power Commission has authority to stay, modify or rescind an order once that order has been affirmed by this Court, if circumstances appearing since the entry of the order seem to make these actions advisable.

"(2) Whether this Court may, in the exercise of its equitable powers, affirm an order of the Commission while preserving the authority of the Federal Power Commission to stay, modify or rescind the order if the circumstances seem to make these actions advisable."

[3] Emphasis by the Commission.

intent to authorize "retrospective adjustments" in light of its "use of the words 'sustained in full'"; and, (iv) requested a "remand" so "that the Commission can discharge its regulatory responsibilities consistent with the Court's opinion."

On June 16, 1970, the court entered its order denying the petitions for rehearing and also entered an opinion stating that "affirmance of the Commission's orders is structured so as to allow the Commission great flexibility" (Continental Appendix B, p. 1). The court stated:

> ". . . We wish to make crystal clear the authority of the Commission in this case to reopen *any* part of its order that circumstances require be reopened. Under section 19(b) of the Natural Gas Act, this Court has the broad remedial powers that inhere in a court of equity, and pursuant to our equitable powers we make it part of the remedy in this case that the authority of the Commission to reopen any part of its orders, including those affecting revenues from gas already delivered, is left intact. The Commission can make retrospective as well as prospective adjustments in this case if it finds that it is in the public interest to do so.
>
> "At the same time, we emphasize that our judgment is an affirmance and not a remand. The appropriate place for originally considering what parts of the orders must be reopened in light of new evidence is before the Commission. It may be that the Commission will decide that the refunds it has ordered are just and reasonable or at least that their significance to the public interest is outweighed by the confusion and delay that would result from their reopening. In this event, the Commission will allow its refund orders to stand as they are. Or it may be that the refunds are too burdensome in light of new evidence to be in the public interest. In that case, it is our judgment that the Commission shall have the power and the duty to remedy the situation by changing its orders.

"In all other respects, the original opinion of this Court is the final disposition of this appeal."[4]

On July 2, 1970, the Commission entered an order staying its own orders, effective upon dissolution of the Court of Appeals' stay. On July 14, 1970, the Court of Appeals issued its judgment as mandate, and the Commission stay thus is and remains in effect.

A motion presently pends before the Commission seeking (i) reopening of the proceeding in Docket No. AR61-2, (ii) consolidation of Docket No. AR61-2 with the Commission's Docket No. AR69-1 in which more current data as to natural gas demand and supply and as to related industry capital requirements have already been presented, and (iii) modification of the opinions and orders reviewed below in light of the record before the Commission in the reopened proceeding.

ARGUMENT

In the Court of Appeals, Bradco, *et al.*, sought express reversal of the Commission on a number of substantive issues and a remand expressly directing the Commission (i) to set aside the opinions and orders under review, (ii) to receive additional evidence, and (iii) to prescribe prices on the basis of current data as to demand, supply deficiencies and industry capital requirements. The Court of Appeals declined to grant the requested relief. Instead, the Court of Appeals adopted a disposition which would permit the Commission, in the first instance, to reconsider its opinions and orders fully, without express directives from the court, and to decide what further steps are warranted.

As set forth in their petition in No. 683 which presently pends before this Court, it is the position of Bradco, *et al.*,

[4] Continental Appendix B, pp. 2-3. Emphasis by the Court.

that the Court of Appeals committed reversible error in not reversing the Commission and formally remanding the case to the Commission with explicit directions to rescind the opinions and orders on review and to reconsider such opinions and orders on the basis of additional relevant and current evidence. Thus, Bradco, *et al.*, continue to pray for the relief sought in their petition in No. 683; however, notwithstanding the foregoing, it is their further position that MDG, AGD and NYPSC are each in error in their assertions, *inter alia*, that the Court of Appeals lacked the power, as such, to effectively withhold finality of a judgment of affirmance and by express terms in the court's June 16, 1970, opinion permit the Commission to reconsider its opinions and orders. In the discussion *infra* with respect to the validity of such disposition by the Court of Appeals, Bradco, *et al.*, do not waive the contentions set forth in their petition in No. 683, but, to the contrary, rely thereon.

Although declining to expressly reverse and remand, the Court of Appeals very obviously intended to leave the Commission the capability — as sought by the Commission's request for remand — to reconsider its orders as fully as on an application for rehearing and to consider anew motions for reopening or for leave to adduce additional evidence. The Commission had already reserved as subject to its own further orders, questions as to amounts collected subject to refund prior to October 1, 1968 (Continental Appendix D, pp. 186-187), and, under the disposition by the court below, amounts collected subsequent to October 1, 1968, under the stays entered by the Court of Appeals and the Commission, likewise are subject to further Commission order.[5] Thus, should the Commission find it in the

[5] As to the general authority of the court and the agency over such funds collected and being collected subject to refund and stay orders, see *Federal Power Commission* v. *Interstate Natural Gas Co.*, 336 U.S. 577 (1949).

public interest, the Commission may retrospectively or prospectively adjust the orders on review as they relate to or control these funds.

The funds in issue thus have been, are, and remain, limited to amounts so collected under the rates at issue *in this case*. The Commission orders here involved also have not become final as a result of the express terms in the Commission's opinion cited *supra*, and orders entered by the agency and the court below. Thus, contrary to assertions by MDG, AGD and NYPSC, questions involving "reparations," collateral modification of final "filed" rates, or "retroactive" changes of final rate orders are simply not presented because of, *inter alia*, the limits on "affirmance" prescribed below in the Court of Appeals' June 16, 1970, opinion. Similarly, "retroactive" increases above rates heretofore charged, collected and received for past periods also are not involved (*cf.* MDG Petition, pp. 16-17).

I. The Court of Appeals' Disposition Under the Opinion of June 16, 1970, Was Within Its Authority Under Section 19(b) of the Natural Gas Act

MDG, AGD and NYPSC argue that the Court of Appeals' disposition is wholly beyond the court's authority under Section 19(b) of the Act (MDG Petition, pp. 19-22; AGD Petition, pp. 9-10; NYPSC Petition; pp. 16-20). However, because of the express terms of the court's opinion of June 16, 1970, such argument is without merit. Although Bradco, *et al.*, submit that reversal and remand with express directions for rescission were and are required in this case,[6] the narrower, alternative, limited disposition on "equitable" grounds under terms of the court's June 16, 1970, opinion is not defective on the grounds of lack of power in a court

[6] See Petition in No. 683.

to so limit effect of its own expressions of "affirmance" of a Commission order.

MDG, AGD and NYPSC appear to argue as though there had been a final "affirmance" below without more, as though the court's opinion of March 19, 1970, stood as a final, unqualified "affirmance," and as though the express limits in the court's June 16, 1970, opinion had never been written.[7] Contrary to their arguments, however, the court did limit the effect of its March 19, 1970, opinion and holdings by designful terms in the June 16, 1970, opinion, clarifying its March 19, 1970, opinion and intentionally withholding any effects of an unqualified "judgment" of "affirmance" that might have barred required, unrestricted Commission reconsideration.

This case, therefore, simply does not present questions as to agency or judicial powers of "rescission" under Section 16 of the Act framed by MDG, or broadly drawn questions posed by MDG, by AGD and by NYPSC as to general agency powers to rescind or otherwise modify an agency order which has been affirmed without such express qualifications or limitations, as here. Section 19(b) of the Act empowers courts of appeals to "affirm, modify or set

[7] In this respect, the two questions stated by MDG, in particular, are not presented in this case (see MDG Petition, p. 1). MDG's first question is drawn as though the June 16, 1970, opinion, and express limits therein, had never been written by the Court of Appeals, and as though the court's holdings of June 16, 1970, rested upon a construction of Section 16 of the Act instead of Section 19(b) as expressly stated by the court. MDG's second question assumes the Court of Appeals held it has the power to fix rates "retroactively" and has conferred this "equitable power" upon the Commission. However, there are no such holdings below; the Court of Appeals withheld finality of its "affirmance," preserving the Commission's statutory authority to reconsider its orders; in so doing, the Court of Appeals referred to its "equitable powers" as a reviewing court under Section 19(b), not to any purported judicial authority to "reverse" rates "retroactively" (*cf.* MDG Petition, p. 3).

aside" a Commission order "in whole or in part," to order additional "evidence to be taken before the Commission . . . in such manner and upon such terms and conditions as to the court may seem proper"; and to enter stays of Commission orders. Significantly, in this instance, prior to entry of its June 16, 1970, opinion, the Court of Appeals had before it (i) renewals of motions under Section 19(b) for leave to adduce additional evidence before the Commission, (ii) petitions urging that finality of an unqualified "affirmance" must be withheld, and (iii) *the Commission's formal request for remand*. The Court of Appeals thus expressly limited its "affirmance" and made provision for continuation of stay by the agency, with the result that finality of an "affirmance" without qualification did not attach and Commission opportunity for reconsideration is preserved.

This Court has stated that authority of a Court of Appeals under a review statute similar to Section 19(b) of the Act does include "equity powers, and while the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action." *Ford Motor Company* v. *National Labor Relations Board*, 305 U.S. 364, 373 (1939). In that instance, a remand for further proceedings without reversal or setting aside of the agency order was sustained; and under similar readings, such remedies as "affirmance" coupled with express granting of motions for leave to adduce additional evidence also have been fashioned.[8]

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[8] See *Hamilton-Brown Shoe Co.* v. *National Labor Relations Board*, 104 F.2d 49 (8th Cir. 1939); *Dolcin Corporation* v. *Federal Trade Commission*, 219 F.2d 742 (D.C. Cir. 1954), cert. den. 348 U.S. 981 (1955). See also *United States* v. *Brown*, 331 F.2d 362, 365 (10th Cir. 1964); *National Labor Relations Board* v. *Central Mercedita, Inc.*, 273 F.2d 370 (1st Cir. 1959).

Where a reviewing court so *expressly* fashions a remedy and so *expressly* limits its holdings, as in the June 16, 1970, opinion below, the "'. . . great principles of equity, securing complete justice, should not yield to light inferences or doubtful construction.'" *Porter* v. *Warner Holding Company*, 328 U.S. 395, 398 (1946) (citing *Brown* v. *Swann*, 10 Pet. (U.S.) 497 (1836)). See also *Arkadelphia Milling Company* v. *St. Louis Sw. Ry. Co.*, 249 U.S. 134 (1919); *United States* v. *Morgan*, 307 U.S. 183, 197 (1939). A conclusion expressed in *Ford Motor Company* v. *National Labor Relations Board, supra,* is pertinent:

> "There is nothing in the statute, or in the principles governing judicial review of administrative action, which precludes the court from giving an administrative body an opportunity to meet objections to its order by correcting irregularities in procedure, or supplying deficiencies in its record, or making additional findings where these are necessary, or supplying findings validly made in the place of those attacked as invalid." (305 U.S. at 375)

The language in the June 16, 1970, opinion harks back to a similar early reading of Section 19(b) of the Act in *Natural Gas Pipeline Co. of America* v. *Federal Power Commission*, 128 F.2d 481 (7th Cir. 1942), in which the principles of the *Ford Motor Company* case were applied:

> ". . . In this respect the legislation is similar in its terms and purport to that governing orders of the Federal Trade Commission, the National Labor Relations Board, and various other administrative bodies. We have previously said in Century Metalcraft Corporation v. Federal Trade Commission, 7 Cir., 112 F.2d 443, that, under the Federal Trade Commission Act, 15 U.S.C.A. § 41 et seq., Congress has made a grant of original jurisdiction to the court to enforce, set aside or modify the Commission's order and that such power carries with it authority to vacate or modify our own judgment whenever good cause is shown. This is in

> accord with announcements of other jurisdictions. We think it well settled that in respect to review of orders of Federal Boards and Commissions, the jurisdiction of the Circuit Court of Appeals, when granted by Congress, is original rather than appellate in character and that, being endowed with original jurisdiction, the court may by its own orders protect the rights of the parties in any manner in which any trial court of equity of general jurisdiction might do so in an injunction suit. Butterick Co. v. Federal Trade Commission, 2 Cir., 4 F.2d 910; Silver Co. v. Federal Trade Commission, 6 Cir., 292 F. 752; Chamber of Commerce v. Federal Trade Commission, 8 Cir., 13 F.2d 673; Federal Trade Commission v. Balme, 2 Cir., 23 F.2d 615, certiorari denied 277 U.S. 598, 48 S.Ct. 560, 72 L.Ed. 1007; Indiana Quartered Oak Co. v. Federal Trade Commission, 2 Cir., 58 F.2d 182." (128 F.2d at 484)

An "affirmance" without such limits, qualifications or other express definition by the reviewing court, therefore, is not presented by virtue of the opinion of June 16, 1970, in this case. While Bradco, *et al.*, submit that reversal and express directives were and are required, the narrower disposition below, leaving initial decision as to corrective action to the agency, was otherwise within the Court of Appeals' prerogatives under Section 19(b) of the Act. Different results compelling specific corrective Commission action are required in this case, but, nevertheless, MDG, AGD and NYPSC clearly err in asserting that the Court of Appeals was without power to so fashion the remedy explicitly provided in the court's June 16, 1970, opinion.

II. The Disposition Under the June 16, 1970, Opinion Does Not Present Conflicts With Decisions of this Court or of the Courts of Appeals

MDG, AGD and NYPSC also argue that the disposition below conflicts with holdings that (i) the Commission has

no power to award reparations, and (ii) filed rates effective by final or "affirmed" Commission action may not be set aside subsequently or collaterally (MDG Petition, pp. 16-17, 20; AGD Petition, pp. 9-10; NYPSC Petition, pp. 16-19). No such conflicts with decisions of this Court or of the Courts of Appeals are presented in light of the provisions of the court's June 16, 1970, opinion.

It is, of course, well settled that the Commission has no "reparations" powers, and that the "filed rate" principle applies under the Act.[9] It is also settled that agency orders which become final as a result of unqualified judicial affirmance, or otherwise by operation of law, generally are not subject to retroactive change or collateral modification.[10] In this case, however, no conflict with these constructions or principles results by virtue of the express, considered, terms of the June 16, 1970, opinion. As shown *supra*, the rates in issue have not become "final," and neither "reparations" nor "retroactive" ratemaking are thus involved.

Thus, the rates in issue in this case have never become "final" filed rates or otherwise made the "legal rate" by Commission action no longer subject to Commission reconsideration under Section 19(b) or judicial review under Section 19(b), in the sense these terms are used in cases cited by MDG, AGD and NYPSC.

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[9] As to these constructions, MDG, AGD and NYPSC correctly cite *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944); *Federal Power Commission* v. *Sunray DX Oil Co.*, 391 U.S. 9 (1968); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951); *State Corporation Commission of Kansas* v. *Federal Power Commission*, 215 F.2d 176 (8th Cir. 1954). See also *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe R. Co.*, 284 U.S. 370 (1932).

[10] As to these principles, MDG, AGD and NYPSC correctly cite *International Union* v. *Eagle-Picher M. & S. Co.*, 325 U.S. 335 (1945); *Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958).

Asserted "conflicts" claimed by MDG, AGD and NYPSC, therefore, are not existent in light of the express terms of the court's order, which such terms preclude the result now claimed by such petitioners. The possible appearance of "conflict" in holdings was thereby deliberately and intentionally removed by the court below in terms qualifying its affirmance, withholding finality and otherwise precluding any operative effect of its judgment impairing Commission reconsideration of the opinions and orders on review. The questions of conflicts posed by MDG, AGD and NYPSC thus would only properly arise if the June 16, 1970, opinion had not been entered by the Court of Appeals.

III. NYPSC Does Not Present A Substantial Question Involving Commission Prescription of Area Rates

NYPSC sets forth a question concerning alleged "cushions" raising the "rate of return" (NYPSC Petition, p. 3, pp. 20-21). Such question actually pertains to a portion of the Commission's opinion involving rate design which was sustained below as fully supported by substantial evidence and required findings, and as consistent with the area rate methodology affirmed by this Court in *Permian*. The question, therefore, presents no issue involving conflict with opinions of this Court, of the Court of Appeals for the District of Columbia Circuit or of any other court; and the question does not warrant review here on any ground asserted by NYPSC.

In *Permian*, this Court sustained Commission use of "non-cost" economic factors in prescribing "area rates," particularly if there were known imperfections or other recognized deficiencies in any "cost" data used. See *Permian Basin Area Rate Cases*, 390 U.S. 747, 791, 815 (1968). These and other steps in the Commission's methodology do not

involve "cushions," "bonuses" or "boosts" of the "rate of return" despite NYPSC's artful labeling. As correctly found below (Continental Appendix A, pp. 27-28, footnotes omitted):

> "Even if we were to construe this case [the *Williams* case cited by NYPSC] as broadly disapproving noncost elements, the application to the sprawling, wildcatting gas producing industry of principles developed in regulating bus and telephone companies would require major adjustments. But this is not the extent of our disagreement with the argument advanced by these intervening parties. We do not understand the law of industry regulation, including the Williams case, to prohibit noncost elements that are based upon appropriate grounds. In *Permian*, the Supreme Court unequivocally stated that the FPC is not bound by the sum of cost and return even if it adopts costs as the primary basis of its calculations. The most persuasive reason for this rule is that cost pricing is circular. Past production has taken place at a given level; if a regulatory body fixes prospective prices at the cost of that production, it may be freezing the level of production, too. We think that the need for dramatically increased production from Southern Louisiana justifies the noncost factors added here, and that the FPC has power to include noncost elements that reflect its assessment of the need to use price as a tool to influence such economic relations. These are propositions that apply generally to regulation of utilities and quasi-utilities."

The court below also disposed of each of NYPSC's specific arguments by reference to the Commission's findings and the record. Repetition of the same arguments here does not present an issue differing from questions disposed of by *Permian* or now warranting another review by this Court.

IV. Disposition Under the Opinion of June 16, 1970, Permits A Result Consistent With the Public Interest and Commission Responsibility for Natural Gas Supply

MDG, AGD and NYPSC each argue, with differing language and emphasis, that Commission reconsideration under the Court of Appeals' opinion of June 16, 1970, necessarily is, or may produce results, contrary to the public interest and the Act's standards (MDG Petition, pp. 13-14, 20-22; AGD Petition, pp. 7-8; NYPSC Petition, pp. 14-15, 17-20). This is not correct. Commission reconsideration and corrective action are urgently required;[11] and, in any event, the disposition below permits the responsible regulatory agency to consider the relevant facts now available and make the determinations in the first instance which now vitally affect current and future area and national gas supply.

Numerous documents presented below and in this Court emphasize facts emergent since 1968 reflecting a present critical shortage of natural gas.[12] A chain relationship is involved, requiring reference to demand, supply, exploratory efforts, capital required and capital actually available under the Commission's 1968 orders. The court below correctly recognized that the Commission should be the body to initially reassess these relationships. Before funds are dissipated under the orders of 1968 to pipeline companies and thence to AGD, MDG and other corporations or local government bodies not subject to the Commission's jurisdiction, the Commission thus is charged by the court with reconsidering those orders in light of new facts reflecting supply deficiencies and declining exploration, development and capital now required for exploration and production.

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[11] See Petition in No. 683.

[12] See e.g., Appendices to Petition of The California Company in No. 682.

The nature, size, cause and cure for a supply shortage and for rising capital needs also were not decided by the court below. That court correctly recognized that the interests of all affected parties, *and the public interest,* will be best served if the Commission is afforded the opportunity for reassessment of these facts before funds are paid over and passed on to AGD and MDG.

It is clear that neither MDG, nor AGD, nor NYPSC can conclusively argue or show that rates or "refunds" based on findings concerning stale data, obsolete assumptions and misconceptions of a plentiful gas supply are in "the public interest." The public interest in, and the Commission's responsibility for, an existent natural gas supply for consumers, as underscored in *Permian,* are inextricably intertwined, as recognized by the court below. As to the supply shortage and any related required modifications of the Commission's 1968 orders, the court declined to accept the *ipse dixit* of any of the parties as conclusive, but called for assessment by the administrative agency in the first instance. That assessment must be permitted (and required, if need be), and is, in and of itself, a step that is in the public interest.

As to the relevant facts that should now control prescription of area rates, the court below also left these for further (and new) agency findings. Neverthelsss, MDG, AGD and NYPSC call for a pretense that economic conditions of 1956, or even 1960, now exist as to demand, supply and capital requirements. Their arguments are presented without regard for the gas supply situation described by a unanimous Federal Power Commission as recently as September 18, 1970, in a decision in the *Hugoton-Anadarko Area Rate Proceeding,* FPC Docket No. AR64-1 (FPC Opinion No. 586, pp. 19-20, mimeo. ed.):

"In determining area rates we have been charged by the Court of Appeals for the Fifth Circuit with predicting the probable demand for gas, determining the desired level of supply and attempting to determine a price which will elicit that level of supply. *Southern Louisiana Area Rate Cases, supra.* The court noted that this task was difficult, but said it must nevertheless be attempted by the Commission.

"All major sources of energy in the United States are currently in short supply. Brown-outs have already occurred in some electric utility distribution areas. Restrictions on gas use have been imposed by distributors in a number of areas and are being considered in others. The stock-pile reserves of coal for electric utilities are below the level considered by the industry to be a safe operating margin. The installation of nuclear power plants has progressed more slowly than was forecast and it now appears that nuclear power will not be able to ease the increasing demand on fossil fuel for many years. Domestic oil reserves are declining. Low-sulphur coal and oil are in short supply. Desulphurization facilities are lagging behind projected demand to meet stringent air pollution standards, destined to grow more stringent in several major urban areas. Pipelines are unable to obtain the desired supplies of natural gas. In 1968, according to the statistics of the AGA, the national findings of natural gas fell below production. This occurred again to a greater degree in 1969, when only about 8.3 trillion cubic feet were added to reserves while production mounted to 20.6 trillion."

In the present case, an area supplying up to one-third of the nation's natural gas supply is involved, and, as petitioners say, "huge sums" also are involved. The critical situation recognized below was that the public interest now calls for Commission reconsideration of its 1968 orders, and reassessment of any dissipation of funds detrimental to exploratory efforts and area and national natural gas supply. It will be only after Commission reconsideration

and reassessment that any party (or court) can allege that the ultimate result is or is not in the public interest. Such Commission reassessment must be permitted, rather than thwarted as sought by MDG, AGD and NYPSC.

V. If the Disposition Under Its Opinion of June 16, 1970, Was Beyond the Power of the Court of Appeals, Then the Court of Appeals Should Be Given the Opportunity or Required to Reconsider Its "Affirmance"

As discussed *supra*, the Court of Appeals "affirmed" the Commission with express "misgivings" and on the assumption the Commission could and would reconsider its opinions and orders in the light of (i) deficiencies enumerated by the court, and (ii) the Commission's expressions of concern over gas supply. Thus, although "affirming" the opinions and orders under review, the Court of Appeals attempted to fashion a remedy leaving the Commission free to take such corrective steps as present circumstances and facts dictate, including rescission of the deficient opinions and orders.

If the "remedy" fixed by the Court of Appeals is *not* available as a matter of law, then the "affirmance" by the Court of Appeals resulted from and rests upon serious misinterpretation of the Act as to Commission powers to act despite the "affirmance." In view of the present gas supply emergency recognized by almost all of the parties below, if this Court (i) determines that the court below erred in its "remedy," (ii) and also does not reverse the erroneous opinions and orders of the Commission and the "affirmance" thereof, then this Court should (i) summarily remand this case to the Court of Appeals with instructions to direct the Commission to reopen the case and, after further proceedings and reconsideration and reassessment, enter such

orders as the Commission may deem to be in the public interest or, in the alternative, (ii) remand the case to the Court of Appeals with instructions to the court to reconsider its judgment in the light of this Court's finding that the "remedy" directed by the Court of Appeals is not available as a matter of law.

CONCLUSION

For the foregoing reasons, the petitions in Nos. 669, 691 and 692 should be denied.

Respectfully submitted,

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October 14, 1970

SUPREME COURT, U. S.

Nos. 669, 691, and 692

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 669

MUNICIPAL DISTRIBUTOR GROUP,
Petitioner

v.

FEDERAL POWER COMMISSION, *et al.*,
Respondents

No. 691

ASSOCIATED GAS DISTRIBUTORS,
Petitioners

v.

AUSTRAL OIL COMPANY, *et al.*,
Respondents

No. 692

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner

v.

AMERADA HESS CORPORATION, *et al.*,
Respondents

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENTS TEXACO INC., *ET AL.*, IN OPPOSITION

Texaco Inc., *et al.* (Texaco et al.), respondents in Nos. 669, *et al.*, and conditional cross-petitioners in No. 681,

hereby submit their brief in opposition to the petitions filed in Nos. 669, 691, and 692 for writs of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on March 19, 1970.

OPINIONS BELOW

The opinion of the Court of Appeals (Continental Appendix A, pp. 1-70) and its opinion on petitions for rehearing (Continental Appendix B, pp. 1-3) are not yet reported. The opinions and orders of the Federal Power Commission (Continental Appendices D, pp. 1-256, and E, pp. 1-112[1]) are reported at 40 FPC 530 and 41 FPC 301. The opinion of the Hearing Examiner (III J.A. (I) 62d-447d) is reported at 40 FPC 703.

JURISDICTION

The judgment of the Court of Appeals was entered on March 19, 1970 (Continental Appendix C, p. 1) and was clarified by an opinion and order denying petitions for rehearing entered on June 16, 1970 (Continental Appendix B, pp. 1-3). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

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[1] Petitioners Continental Oil Company, *et al.* have filed in No. 680 Appendices to their Petition for Writ of Certiorari containing the complete text of opinions and judgment below, the agency opinions, and statutes involved. References herein to "Continental Appendix" are to that document. Petitioners Continental Oil Company, *et al.* have also filed forty copies of the Joint Appendix in the Court of Appeals which consisted of four volumes designated as Part I and two volumes designated as Part II. A citation here to "III J.A. (I) 62d" therefore refers to Volume III of Part I, page 62d. Such page designations appear at the bottom of each page, and pages included in each of the volumes are shown in parentheses at bottom of the cover of each Volume of that Joint Appendix.

QUESTIONS PRESENTED

In light of the opinions and judgment below, Texaco *et al.*, deem all petitions for writs of certiorari in this case premature and questions raised thereby not yet ripe for review by this Court. Therefore, the questions actually raised by the petitions in Nos. 669, 691 and 692 are:

1. Whether the questions presented are ripe for review after the Court of Appeals affirmed decisions and orders of the Federal Power Commission under Section 19(b) of the Natural Gas Act, but, after a request for remand by the Commission, the court preserved all Commission powers to reconsider, rescind, or otherwise modify the decisions and orders, and the case is now pending before the Commission on motion seeking such reconsideration, rescission, and other modification?

2. Assuming *arguendo* the questions are not premature, whether after a Commission request for remand, the Court of Appeals, in the exercise of its equitable power on review under Section 19(b) of the Natural Gas Act, may affirm Commission decisions and orders but withhold finality and otherwise expressly preserve Commission authority to reconsider, rescind, or otherwise modify its decisions and orders if the Commission finds it in the public interest to do so?

3. Assuming *arguendo* the question raised in No. 692 as to Commission prescribed rates is not premature, whether substantial evidence and adequate findings support non-cost rate design adjustments made by the Commission to prescribe area rates under the method affirmed in the *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968)?

STATUTE INVOLVED

Sections 4(a), 4(e), 5(a), 16, and 19(b) of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717-717w, are involved and are reproduced at Continental Appendix F, pp. 1-8.

STATEMENT

This brief is submitted in opposition to the petitions filed by the Municipal Distributor Group (MDG), the Associated Gas Distributors (AGD), and the Public Service Commission of New York (NYPSC). Those petitioners have set forth parts of the history of the case before the Commission and the Court of Appeals. In addition, in their Conditional Cross-Petition filed in No. 681, Texaco, *et al.*, have set forth a more complete, full statement of this case which is not here repeated, but to which reference respectfully is made. Those portions of that history which are most pertinent to the questions presented in Nos. 669, 691, and 692 are:

In its March 19, 1970 opinion, the Court of Appeals had found defect after defect in the Commission decisions. On the "'most serious issue" involving Commission findings and legal standards—termed "the supply problem" by the court—the Court of Appeals recognized that this Court held in *Permian* that "adequate findings" would be required in the future, but noted that the Commission had left gaps similar to the omissions criticized by this Court in *Permian*. The Court of Appeals also specifically found ". . . the Commission failed to approach supply and demand in either a semi-quantitative or qualitative way" (Continental Appendix A, pp. 49-50), and laid bare other defects in "findings" on related questions of supply, demand, and actual availability of capital to the industry at rates prescribed (Continental Appendix A, pp. 52-69). The court also noted existence of more current data then and now available to the Commission, including the study by the Commission's Staff released in October, 1969, indicating "perhaps a certainty, that the supply of gas is dangerously low" and "a serious shortage, in fact, may already be unavoidable" (Continental Appendix A, p. 52). The court also found that the assessment of the crucial facts as to supply, demand, and impact of prescribed rates called for by *Permian* had not been made in this case.

Therefore, it expressed "serious misgivings about affirming the Commission" and did so only with affirmative statements that the Commission still may "set aside the present order pending further determination" (Continental Appendix A, pp. 56-57); that "affirmance" is not a "judgment that the supply problem is not serious enough to require immediate modification of the order herein sustained" (Continental Appendix A, p. 59); that "the Commission must explain the relationship between the level of service, the demand for service, and the price it sets" (Continental Appendix A, p. 68); that the "mandate" of the Court should not "be interpreted to interfere with Commission action that would change the rates" (Continental Appendix A, p. 69); that, citing Section 16 of the Act and with emphasis supplied by the Court, the Commission had power to "rescind" its orders; and that dissolution of the court's stay would be without prejudice to Commission power "to stay its own order or to take any other appropriate action affecting this case" (Continental Appendix A, p. 70).

Thereafter, petitions for rehearing by these and some of the other parties raised *inter alia*, questions of whether an "affirmance" could leave the Commission with unimpaired powers to stay, vacate, modify or rescind its orders, as contemplated by the court. The court thereupon directed the Commission to respond to the petitions and to two specific questions concerning (1) Commission authority to stay, modify or rescind an order that has been "affirmed"; and (2) equitable powers of the court to "affirm" while preserving Commission powers "to stay, modify, or rescind" any order.[2]

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[2] The full text of the questions posed by the court is:

"(1) Whether the Federal Power Commission has authority to stay, modify or rescind an order, once that order has been affirmed by this Court, if circumstances appearing since the entry of the order seem to make these actions advisable.

[Footnote continued on page 6]

In response, the Commission (1) took the position that it would not "have authority to permit any retroactive increases or decreases in a rate order, unless authorized to do so by a court"; (2) stated that extent of the court's "equitable powers" had not been decided, and the court had "full statutory power to authorize or instruct the Commission" to "reconsider" the record or "reopen the record" for specific purposes "without necessarily reversing the Commission and vacating the order for a new hearing"; (3) noted the need for clarification of the Court's intent to authorize "retrospective adjustments" in light of its "use of the words 'sustained in full'"; and (4) requested a "remand" so "that the Commission can discharge its regulatory responsibilities consistent with the Court's opinion."[2]

On the basis of the petitions, responses, and the Commission request for remand, on June 16, 1970, the court entered its order denying the petitions for rehearing, but also entered an opinion stating that "affirmance of the Commission's orders is structured so as to allow the Commission great flexibility" (Continental. Appendix B, p. 1). The court stated:

> "We wish to make crystal clear the authority of the Commission in this case to reopen any part of its order that circumstances require be reopened. Under section 19(b) of the Natural Gas Act, this Court has the broad remedial powers that inhere in a court of equity, and pursuant to our equitable powers we make it part of the remedy in this case that the authority of the Commission to reopen any part of its orders, including those affecting revenues from gas already delivered, is left intact. The Commission can make retrospective as well as prospective adjustments

[2] [Continued]

"(2) Whether this Court may, in the exercise of its equitable powers, affirm an order of the Commission while preserving the authority of the Federal Power Commission to stay, modify or rescind the order if the circumstances seem to make these actions advisable."

in this case if it finds that it is in the public interest to do so.

"At the same time, we emphasize that our judgment is an affirmance and not a remand. The appropriate place for originally considering what parts of the orders must be reopened in light of new evidence is before the Commission. It may be that the Commission will decide that the refunds it has ordered are just and reasonable or at least that their significance to the public interest is outweighed by the confusion and delay that would result from their reopening. In this event, the Commission will allow its refund orders to stand as they are. Or it may be that the refunds are too burdensome in light of new evidence to be in the public interest. In that case, it is our judgment that the Commission shall have the power and the duty to remedy the situation by changing its orders.

"In all *other* respects, the original opinion of this Court is the *final* disposition of this appeal." (Emphasis supplied)

On July 2, 1970, the Commission entered an order staying its own orders, effective upon dissolution of the court's stay. On July 14, 1970, the Court of Appeals issued its judgment as mandate, and the Commission stay thus is and remains in effect.

Texaco, *et al.* have filed with the Commission a motion seeking (1) reopening of the proceeding, (2) consolidation with the Commission's Docket No. AR69-1 in which more current data as to natural gas demand and supply and as to related industry capital requirements has already been presented, and (3) modification of the orders reviewed below in light of the record before the Commission in the reopened proceeding.

ARGUMENT

In the Court of Appeals, Texaco *et al.* sought express reversal of the Commission on a number of substantive

issues and a remand expressly directing the Commission to set aside its orders, to receive additional evidence, and to prescribe rates on the basis of current data as to supply deficiencies and industry capital requirements. The Court of Appeals declined to grant this relief. Instead, on the basis of pleadings which included the Commission's formal request for remand, the Court of Appeals effectively withheld finality of a judgment of affirmance by express terms in its June 16, 1970 opinion to permit the Commission to reconsider its opinions and orders.

This express action by the Court of Appeals now affords opportunity to all parties below—including Petitioners MDG, AGD, and NYPSC—to be heard fully before the Commission on all substantive issues involving continued validity of the orders reviewed below, current data pertinent to Commission reconsideration, and any retrospective or prospective modification found by the Commission to be in the public interest. All substantive questions in this multi-party, multi-sided case thus are left pending before the Commission by the opinions below, and that pendency and the terms of the Court of Appeals' opinion of June 16, 1970 thus render questions now presented by MDG, AGD, and NYPSC premature.

Texaco, *et al.*, therefore oppose the granting of the petitions in Nos. 669, 691, and 692, and further show that MDG, AGD, and NYPSC also are in error in their assertions that the disposition below, as clarified by the June 16, 1970 opinion, (1) rests upon misconstruction of Section 19(b) of the Natural Gas Act, (2) conflicts with decisions of this Court and of the Courts of Appeals, (3) may generally and adversely affect administration of the Natural Gas Act, or (4) precludes disposition of this case consistent with the Act's standards and the public interest.

Texaco, *et al.*, therefore submit that the petitions in Nos. 669, 691, and 692 should be denied.

I. Questions Presented by the Petitioners in Nos. 669, 691, and 692 Are Premature

Express reversal and formal remand with explicit directions to rescind the orders on review were fully supportable in this case and would have been consistent with the record and applicable precedent.[3] However, the Court of Appeals adopted a disposition which permits the Commission, in the first instance, to reconsider its opinions and orders fully, without any such express directives from the court, and to decide what further steps, if any, are warranted.

In light of this posture of the case, all questions involving claims of aggrievement, current facts as to present and future shortages of natural gas, availability of new evidence as to changes of capital requirements, and the relationships of these facts to the specific provisions of Commission's orders on review, are left for plenary consideration by the Commission. All parties—including those who are petitioners here—can be heard before any Commission reconsideration or change of its 1968 orders. The administrative body, under the mandate of the court below, then may reconsider its orders and decide upon retrospective or prospective "adjustments in this case if it finds that it is in the public interest to do so" (Continental Appendix B, p. 2).

Neither MDG, AGD, nor NYPSC may be aggrieved by such further Commission action. Significantly, none of these parties contends that in prescribing area rates the Commission should ignore current supply evidence and its relationship to price. The opinions of the Court of Appeals and actions by the Commission to date in this case correctly recognize existence of new evidence as to na-

[3] See Conditional Cross-Petition filed by Texaco, *et al.*, in No. 681. The position of Texaco, *et al.*, as there stated, is that if the remedy fashioned by the Court of Appeals is ineffective, then the court below erred in not reversing and remanding to permit the Commission consideration intended by the Court of Appeals.

tional and area gas supply emergent between the Commission decision on September 25, 1968 and the Court of Appeals' opinion of June 16, 1970 (see Appendices to Petition of The California Company in No. 682). In the view of the Court of Appeals and as indicated by the Commission's request for remand below, this new evidence of a gas shortage and related industry capital requirements in the late 1960's, and at present, is at least sufficient to require that the Commission should have opportunity to reconsider the 1968 orders on review in this case. As detailed at pages 10-13 in the Statement in the Conditional Cross-Petition of Texaco, *et al.*, the record, this Court's teachings in *Permian*, and the new evidence also clearly signal a situation so calling for prompt Commission reconsideration, particularly of the effect which implementing the 1968 orders would have upon exploration and development capability in the Southern Louisiana area.

The Court of Appeals correctly read these signals, but concluded that the Commission, rather than a reviewing court, was the appropriate body to formulate the remedial measures required. The court stated: "The appropriate place for originally considering what parts of the orders must be reopened in light of new evidence is before the Commission" (Continental Appendix B, p. 2). The court, therefore, intended to leave no bar to Commission reassessment of its orders in light of today's supply situation and capital needs, and left all responsive steps for Commission decision in the first instance. Contrary to implications of the petitions in Nos. 669, 691, and 692, the Commission thus is left by the court with responsibility for deciding what modification, if any, is now warranted or may be found in the public interest. None is directed specifically by the court, and under the opinions below, agency findings as to what is acquired by the public interest remain a prerequisite to any new Commission action. The grant of the petitions in these cases, thereby further extending this prolonged litigation, will

frustrate and impede such prompt reconsideration required by the critical supply situation and sought by the agency itself.

Leaving aside the narrow, technical questions as to the basis for the court's disposition under Section 19 (b), discussed *infra*, the Court of Appeals' June 16, 1970 opinion is intended to leave the Commission the flexibility and capability—as sought by the Commission's request for remand—to reconsider its orders as fully as on an application for rehearing and to consider anew motions for reopening or for leave to adduce additional evidence. At this juncture, the results of Commission reconsideration and impact upon the various petitioners here necessarily are unknown. As the Court has been apprised, many of the parties are engaged in settlement negotiations, presided over by Commission counsel, with the expectation that the result will be acceptable to most, if not all, of the parties and acceptable to the Commission.[4] Absent that result, numerous other possibilities exist. In its reconsideration, the Commission may find no modification of its 1968 orders is warranted; or the Commission may find modifications in part only are justified; or as Texaco, *et al.*, believe, the Commission may find that presently known facts as to supply and capital requirements compel modifications that will be recognized as fully justified and in the public interest by most, if not all, of the parties cognizant of these facts. Regardless of present differences, future Commission action therefore can moot questions now presented.

Review at this juncture, particularly in light of the "aggrievement" requirements of Section 19(b) of the Act, thus is premature. The petitions in Nos. 669, 691, and 692, therefore, should be denied.

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[4] See Petition filed by The California Company in No. 682, pp. 12-14.

II. The Court of Appeals' Disposition under the Opinion of June 16, 1970 Was Within Its Authority under Section 19(b) of the Natural Gas Act

MDG, AGD, and NYPSC argue that the court's disposition is wholly beyond the court's authority under Section 19(b) of the Natural Gas Act (MDG Petition, pp. 19-22; AGD Petition, pp. 9-10; NYPSC Petition, pp. 17-20). However, because of the express terms of the opinion of June 16, 1970, this argument is without merit. While Texaco, *et al.*, submit that reversal and remand with express directions for rescission were and are more than warranted in this case, the narrower, alternative, limited disposition on "equitable" grounds under terms of the June 16, 1970 opinion is not defective on the grounds of lack of power in a court to so limit effect of its own expressions of "affirmance" of a Commission order.

MDG, AGD, and NYPSC now argue as though there had been a final "affirmance" below without more, as though the opinion of March 19, 1970 stood as a final, unqualified "affirmance," and as though the express limits in the June 16, 1970 opinion had never been written.[5] Contrary to their arguments, however, the court did limit effect of its March 19, 1970 opinion and holdings by express terms in the June 16, 1970 opinion, clarifying its March 19, 1970 opinion and intentionally withholding any

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[5] See Conditional Cross-Petition of Texaco, *et al.* in No. 681.

[6] In this respect, the two questions stated by MDG, in particular, are not presented in this case (see MDG Petition, p. 1). MDG's first question is drawn as though the June 16, 1970 opinion, and express limits therein, had never been written by the Court of Appeals, and as though the court's holdings of June 16, 1970 rested upon a construction of Section 16 of the Act instead of Section 19(b) as expressly stated by the court. MDG's second question assumes the Court of Appeals held it has the power to fix rates "retroactively" and then has conferred this "equitable power" upon the Commission. However, there are no such holdings below. The Court of Appeals referred to its "equitable powers" as a reviewing court under Section 19(b), not to any purported judicial authority to "reverse" rates "retroactively" (*cf.* MDG Petition, p. 3).

effects of an unqualified "judgment" of "affirmance" that might have barred required, unrestricted Commission reconsideration.

This case, therefore, simply does not now present the questions as to agency or judicial powers of "rescission" under Section 16 of the Act, framed by MDG, or broadly drawn questions posed by MDG, by AGD, and by NYPSC as to general agency powers to rescind or otherwise modify an agency order which has been affirmed without such express qualifications or limitations. Section 19(b) empowers the Courts of Appeals to "affirm, modify, or set aside" a Commission order "in whole or in part," to order additional "evidence to be taken before the Commission . . . in such manner and upon such terms and conditions as to the court may seem proper"; and to enter stays of Commission orders. Significantly, in this instance, prior to entry of its June 16, 1970 opinion, the Court of Appeals had before it renewals of motions under Section 19(b) for leave to adduce additional evidence before the Commission, petitions urging that finality of an unqualified "affirmance" must be withheld, and *the Commission's* formal request for remand. Responsive to these pleadings, the Court of Appeals' opinion and orders expressly limited its "affirmance" and made provision for continuation of stay by the agency, with the results that finality of an "affirmance" without qualification did not attach, and Commission opportunity for reconsideration of the orders is preserved.

This Court has stated that authority of a Court of Appeals under a review statute similar to Section 19(b) does include "equity powers, and while the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action." *Ford Motor Co.* v. *National Labor Relations Board*, 305 U.S. 364, 373 (1939). In that instance, a remand for further proceed-

ings without reversal or setting aside of the agency order was sustained; and under similar readings, such remedies as "affirmance" coupled with express granting of motions for leave to adduce additional evidence also have been fashioned.[7] Where a reviewing court so *expressly* fashions a remedy and so *expressly* limits holdings, as in the June 16, 1970 opinion below, the ". . . great principles of equity should not yield to light inferences or doubtful construction." *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946). See also *Arkadelphia Mill Co.* v. *St. Louis S. W. R. Co.*, 249 U.S. 134 (1919); *United States* v. *Morgan*, 307 U.S. 183, 197 (1938).

A compelling sequence of events below thus led to the court's opinion of June 16, 1970, and the expression of a remedy to afford the agency, after its formal request for remand, opportunity for reconsideration. The language in the June 16, 1970 opinion also harks back to a similar early reading of Section 19(b) of the Natural Gas Act in *Natural Gas Pipeline Co. of America* v. *Federal Power Commission*, 128 F.2d 481 (7th Cir. 1942), in which the principles of the *Ford Motor Company* case were applied:

> "In this respect the legislation is similar in its terms and purport to that governing orders of the Federal Trade Commission, the National Labor Relations Board, and various other administrative bodies. We have previously said in Century Metalcraft Corporation v. Federal Trade Commission, 7 Cir., 112 F.2d 443, that, under the Federal Trade Commission Act, 15 U.S.C.A. § 41 et seq., Congress has made a grant of original jurisdiction to the court to enforce, set aside or modify the Commission's order and that such power carries with it authority to vacate or modify our own judgment whenever good cause is shown.

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[7] See *Hamilton-Brown Shoe Co.* v. *National Labor Relations Board*, 104 F.2d 49 (8th Cir. 1939); *Dolcin Corp.* v. *Federal Trade Commission*, 219 F.2d 742 (D.C. Cir. 1954), cert. den. 348 U.S. 981 (1955). See also *United States* v. *Brown*, 331 F.2d 362, 365 (10th Cir. 1964); *National Labor Relations Board* v. *Central Mercendita, Inc.*, 273 F.2d 370 (1st Cir. 1959).

This is in accord with announcements of other jurisdictions. *We think it well settled that in respect to review of orders of Federal Boards and Commissions, the jurisdiction of the Circuit Court of Appeals, when granted by Congress, is original rather than appellate in character and that, being endowed with original jurisdiction, the court may by its own orders protect the rights of the parties in any manner in which any trial court of equity of general jurisdiction might do so in an injunction suit.*" (128 F.2d at 484, emphasis supplied)

An "affirmance" without such limits, qualifications, or other express definition by the reviewing court therefore is not presented by virtue of the opinion of June 16, 1970 in this case. While Texaco, *et al.*, submit that reversal and express directives were and remain warranted, the narrower disposition below, leaving initial decision as to corrective action to the agency, was within the Court of Appeals' prerogatives under Section 19(b). Different results compelling specific corrective Commission action are sustainable in this case, but MDG, AGD, and NYPSC clearly err in asserting that the court was without any power to so fashion the minimal remedy explicitly stated in the June 16, 1970 opinion.

III. Disposition under the June 16, 1970 Opinion Does Not Present Conflicts with Decisions of This Court or the Courts of Appeals

MDG, AGD, and NYPSC also argue that the disposition below conflicts with holdings that (1) the Commission has no powers to award reparations, and (2) filed rates effective by final or "affirmed" Commission action may not be set aside subsequently or collaterally. (MDG Petition, pp. 16-17, 20; AGD Petition: pp. 9-10; NYPSC Petition, pp. 16, 19). No such conflicts with decisions of this Court or of the Courts of Appeals are presented in light of the provisions of the June 16, 1970 opinion.

It is, of course, well settled that the Commission has no "reparations" powers, and that the "filed rate" principle applies under the Natural Gas Act.[8] It is also settled that agency orders that become final as a result of unqualified judicial affirmance, or otherwise by operation of law, generally are not subject to retroactive change or collateral modification.[9] In this case, however, no conflict with these constructions or principles results by virtue of the express terms of the June 16, 1970 opinion. As shown *supra*, the rates in issue have not become "final," and "reparations" or "retroactive" ratemaking thus are not involved.[10] Beyond this, the finality of an unqualified "affirmance" did not attach by virtue of timely petitions for rehearing, and the subsequent express terms of the court in the June 16, 1970 opinion.

For these reasons, the rates in issue in this case have never become "final" filed rates or otherwise made the "legal rate" by Commission action no longer subject to Commission reconsideration under Section 19(a) or judicial review under Section 19(b), in the sense these terms are used in cases cited by MDG, AGD, and NYPSC. Neither the holdings below, nor the effect of the opinions below, nor the ultimate result contemplated by the court below, therefore is, or can be now labelled as, in conflict

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[8] As to these constructions, MDG, AGD, and NYPSC correctly cite *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944); *Federal Power Commission* v. *Sunray DX Oil Co.*, 391 U.S. 9 (1968); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951); *State Corporation Commission of Kansas* v. *Federal Power Commission*, 215 F.2d 176 (8th Cir. 1954). See also *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe R. Co.*, 284 U.S. 370 (1932).

[9] As to these principles, MDG, AGD, and NYPSC correctly cite *International Union* v. *Eagle-Picher M. & S. Co.*, 325 U.S. 335 (1945); *Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958).

[10] By the same token, "retroactive increases" *above* the rates heretofore charged, collected, and received for past periods also are *not* involved. *Cf.* MDG Petition, pp. 16-17.

with the "filed rate" and "finality" principles set forth in decisions of this Court and the Courts of Appeals.

Asserted "conflicts" claimed by MDG, AGD, and NYPSC therefore are not existent in light of the court's express terms, precluding the result now claimed by these petitioners. The appearance of "conflict" in holdings was thereby deliberately and intentionally removed by the court below in terms qualifying its affirmance, withholding finality, and otherwise precluding any operative effect of its judgment impairing Commission reconsideration of the opinions and orders on review.

IV. NYPSC Does Not Present a Substantial Question Involving Commission Prescription of Area Rates

NYPSC sets forth a question concerning alleged "cushions" boosting the "rate of return" (NYPSC Petition, pp. 3, pp. 20-21). With all deference to fanciful language of NYPSC, the question actually pertains to a portion of the Commission opinion involving rate design which was sustained below as fully supported by substantial evidence and required findings, and as consistent with the area rate methodology affirmed by this Court in *Permian*. The question, therefore, presents no issue involving conflict with opinions of this Court, of the Court of Appeals for the District of Columbia Circuit, or of any other court; and the question does not warrant review here on any ground asserted by NYPSC.

In *Permian*, this Court sustained Commission use of "non-cost" economic factors in prescribing "area rates," particularly if there were known imperfections or other recognized deficiencies in any "cost" data used. See *Permian Basin Area Rate Cases*, 390 U.S. 747, 791, 815 (1968). These and other steps in the Commission methodology do not involve "cushions," "bonuses," or "boosts" of the "rate of return" despite NYPSC's colorful labelling. As correctly found below (Continental Appendix A, pp. 26-28, footnotes omitted):

> "Even if we were to construe this case [the *Williams* case cited by NYPSC] as broadly disapproving noncost elements, the application to the sprawling, wildcatting gas producing industry of principles developed in regulating bus and telephone companies would require major adjustments. But this is not the extent of our disagreement with the argument advanced by these intervening parties. We do not understand the law of industry regulation, including the Williams case, to prohibit noncost elements that are based upon appropriate grounds. In *Permian*, the Supreme Court unequivocally stated that the FPC is not bound by the sum of cost and return even if it adopts costs as the primary basis of its calculations. The most persuasive reason for this rule is that cost pricing is circular. Past production has taken place at a given level; if a regulatory body fixes prospective prices at the cost of that production, it may be freezing the level of production, too. We think that the need for dramatically increased production from Southern Louisiana justifies the noncost factors added here, and that the FPC has power to include noncost elements that reflect its assessment of the need to use price as a tool to influence such economic relations. These are propositions that apply generally to regulation of utilities and quasi-utilities."

The court below also disposed of each of NYPSC's specific arguments by reference to the Commission's findings and the record. Repetition of the same arguments here does not present an issue differing from questions disposed of by *Permian* or now warranting another review by this Court. Review of these particular issues also would require a major re-examination by this Court of interrelated costing, rate design, and other rate of return issues decided by *Permian* [11]—an undertaking conflicting with

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[11] See, *e.g.*, Questions Presented in Nos. 680, 682, 683, 684, and 685. If NYPSC's Petition were granted, petitions raising related cost, rate of return, and rate design issues also should be considered with NYPSC's question.

NYPSC's own urgings that expeditious disposition of this case is required.

V. Disposition under the Opinion of June 16, 1970 Permits a Result Consistent with the Public Interest and Commission Responsibility for Natural Gas Supply

MDG, AGD, and NYPSC argue, with differing language and emphasis, that Commission reconsideration under the Court of Appeals' opinion of June 16, 1970 necessarily is, or may produce results, contrary to the public interest and the Act's standards (MDG Petition, pp. 13-14, 20-22; AGD Petition, pp. 7-8; NYPSC Petition, 14-15, 17-20). This is not correct. Commission reconsideration and corrective action are urgently required; and in any event, the disposition below permits the responsible regulatory agency to consider the relevant facts now available and make the determinations, in the first instance, which now vitally affect current and future area and national gas supply.

Numerous documents presented below and in this Court emphasize facts reflecting a present shortage of natural gas.[12] A chain relationship is involved, requiring reference to demand, supply, exploratory efforts, capital required, and capital actually available under the Commission's 1968 orders. The court below correctly recognized that the Commission should be the body to reassess these relationships initially. The nature, size, cause, and cure for a supply shortage and for rising capital needs also were not decided by the court below. That court correctly recognized that the interests of all affected parties and the public interest will be best served if the Commission also is afforded the opportunity for reassessment of these facts before funds are paid over and passed on to AGD and MDG.

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[12] See *e.g.*, Appendices to Petition of The California Company in No. 682.

Most parties below agree and now urge this Court to permit that re-examination, even under the limited restrictions of the June 16, 1970 opinion, by denying the premature petitions for review here. It is clear that neither MDG, nor AGD, nor NYPSC can conclusively argue or show that rates or "refunds" based on findings concerning stale data, obsolete assumptions, and misconceptions of a plentiful supply are in "the public interest." The public interest in, and the Commission's responsibility for, an existent natural gas supply for consumers, as underscored in *Permian*, are inextricably intertwined, as recognized by the court below. As to the supply shortage and any related required modification of the 1968 orders, the court so declined to accept the *ipse dixit* of any of the parties as conclusive, but called for assessment by the administrative agency in the first instance. That assessment can be permitted, and is, in and of itself, a step that is in the public interest.

As to the relevant facts that now should control prescription of area rates, the court below also left these for further agency findings. Nevertheless, MDG, AGD, and NYPSC call for a pretense that economic conditions of 1956 or even 1960 now exist as to demand, supply, and capital requirements. Their arguments are presented without regard for the supply situation described by a unanimous Federal Power Commission as recently as September 18, 1970, in a decision in the *Hugoton-Anadarko Area Rate Proceeding*, FPC Docket No. AR64-1 (FPC Opinion No. 586, pp. 19-20, mimeo. ed.):

> "In determining area rates we have been charged by the Court of Appeals for the Fifth Circuit with predicting the probable demand for gas, determining the desired level of supply and attempting to determine a price which will elicit that level of supply. *Southern Louisiana Area Rate Cases, supra.* The court noted that this task was difficult, but said it must nevertheless be attempted by the Commission.

"All major sources of energy in the United States are currently in short supply. Brown-outs have already occurred in some electric utility distribution areas. Restrictions on gas use have been imposed by distributors in a number of areas and are being considered in others. The stockpile reserves of coal for electric utilities are below the level considered by the industry to be a safe operating margin. The installation of nuclear power plants has progressed more slowly than was forecast and it now appears that nuclear power will not be able to ease the increasing demand on fossil fuel for many years. Domestic oil reserves are declining. Low-sulphur coal and oil are in short supply. Desulphurization facilities are lagging behind projected demand to meet stringent air pollution standards, destined to grow more stringent in several major urban areas. Pipelines are unable to obtain the desired supplies of natural gas. In 1968, according to the statistics of the AGA, the national findings of natural gas fell below production. This occurred again to a greater degree in 1969, when only about 8.3 trillion cubic feet were added to reserves while production mounted to 20.6 trillion."

In the present case, an area supplying up to one-third of the nation's natural gas supply is involved, and, as petitioners say, "huge sums" also are involved. The critical situation recognized below was that the public interest now calls for Commission reconsideration of the 1968 orders, and reassessment of any dissipation of funds detrimental to exploratory efforts and area and national natural gas supply. It will be only after Commission reconsideration and reassessment that any party can allege that the ultimate result is or is not in the public interest. That Commission reassessment should be permitted, rather than thwarted as sought by MDG, AGD, and NYPSC.

CONCLUSION

For the foregoing reasons, the petitions in Nos. 669, 691, and 692 should be denied; but if they are granted, then for reasons stated herein, the Conditional Cross-Petition filed by Texaco, *et al.*, in No. 681 also should be granted. Thereupon, Texaco, *et al.*, would urge that the Court summarily remand the case to the Commission with appropriate instructions to correct the errors of law set forth in the Questions Presented in No. 681. Such disposition will moot the Questions Presented in Nos. 669, 691, and 692.

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October 14, 1970

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1970

No. 669, et al

MUNICIPAL DISTRIBUTOR GROUP, *et al.*,
Petitioners,

v.

FEDERAL POWER COMMISSION, *et al.*,
Respondents.

BRIEF OF HUMBLE OIL & REFINING COMPANY IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1970

Nos. 669, 691, 692, 680, 681, 682, 683, 684 and 685

MUNICIPAL DISTRIBUTOR GROUP, *et al.*,
Petitioners,

v.

FEDERAL POWER COMMISSION, *et al.*,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF HUMBLE OIL & REFINING COMPANY IN OPPOSITION

Respondent, Humble Oil & Refining Company ("Humble"),[1] opposes the petitions for writ of certiorari filed by the Municipal Distributor Group (MDG), No.

1. Humble, a petitioner in the proceedings below, is a respondent only here, not having joined in any of the petitions for writ of certiorari.

669, the Associated Gas Distributors (AGD), No. 691, and The Public Service Commission of the State of New York (NYPSC), No. 692, all of which relate to the opinion of the Court of Appeals for the Fifth Circuit issued March 19, 1970, in No. 27492 and its order on rehearing issued June 16, 1970. Petitions for writ of certiorari or conditional cross-petitions have also been filed by Continental Oil Co., *et al.*, No. 680; Texaco Inc., No. 681; The California Co., a Division of Chevron Oil Co., No. 682; Bradco Properties, Inc., *et al.*, No. 683; E. Cockrell, Jr., No. 684; and The Superior Oil Co., No. 685. Humble also opposes the granting of these petitions.[2]

The conditional cross-petition filed by Texaco Inc. adequately sets out the opinions below, jurisdiction, and statutes involved, and, for brevity, Humble adopts those statements.

QUESTIONS PRESENTED

(1) Did the court below act according to law and reasonably in exercising its equitable powers in sustaining the Commission in full when it held that the Commission could, in implementing the court's opinion with regard to the interrelationship of price and supply, apply the final result of such implementation to all rates involved in the proceedings under review?

(2) Are issues as to the validity of Commission action ripe for review by this Court where the court below, in affirming a Commission area rate opinion, outlined the

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2. With the filing of its petition, Continental Oil Company submitted a number of appendices containing, among other things, the opinions and judgment below, the opinions of the Federal Power Commission and the statutes involved. References in this brief shall be made to the pertinent portions of the "Cont. App."

rationale which the Commission should apply and the Commission has, pursuant to the court's suggestion, continued a stay of its own area rate order pending implementation of the court's opinion but has not yet issued a final order?

(3) When, by reason of stays ordered by a reviewing court and issued by the Commission, rates prescribed by a Commission opinion have never been made effective would entry of a Commission order implementing the reviewing court's opinion constitute reparations?

STATEMENT OF THE CASE

Humble adopts the Statement of the Case in the conditional cross-petition filed by Texaco Inc., *et al.*; subject however, to the following qualifying and supplemental statement. The petition for rehearing in the court below filed by Humble did not question the Commission's power to take appropriate action in light of affirmance, and expressly did not urge reversal and remand. Humble carefully limited its petition for rehearing in the court below urging that affirmance of Opinion No. 546 is appropriate provided that the guidance afforded by the court's opinion is sufficiently explicit to assure that the Commission would give adequate consideration to the gas supply problem and fashion an appropriate remedy prior to the time at which prescribed rates are permitted to go into effect. Thus, the blanket assertions of AGD (Br., p. 5), MDG (Br., p. 10), and NYPSC (Br., p. 13) that all producer petitioners requested a remand because affirmance "would preclude the Commission from re-examining revenues from gas that has already been delivered" (AGD Br., p. 5) are unfounded. On the contrary,

Humble strongly urged that affirmance would be appropriate in the circumstances of this case.

By reason of successive stays issued by the Commission and the court below, Opinion No. 546 rates have never been made effective.[3] The Commission has before it a motion for consolidation of AR61-2 (the original Southern Louisiana Area Rate Proceedings in which Opinion No. 546 was issued) with AR69-1 (the second round of Southern Louisiana Area Rate Proceedings commenced March 20, 1969) where extensive evidence of the gas supply shortage and the effect of price on supply has been adduced. Thus, by appropriate action, the Commission may promptly implement the lower court's opinion and modify its schedule of rates prescribed in Opinion No. 546, if the evidence supports such action. However, until action is taken, no one can foretell what, if any, issue will be presented for review. Significantly, settlement discussions have been instituted under the aegis of the Commission which may resolve all issues with respect to the rates here under review (see App. B, The California Company Petition in No. 682, pp. 16-30).

ARGUMENT

All petitions for writ of certiorari, both unconditional and conditional, should be denied. This Nation faces an unprecedented energy shortage, including woefully inadequate supplies of natural gas required to meet the burgeoning demands of consumers. Such demands are compounded by environmental considerations calling for

3. See "Order Staying Rate Reductions," issued May 29, 1969; order of Court of Appeals for the Fifth Circuit in Nos. 27492, *et al.*, filed October 10, 1969; and "Order Continuing Stay" issued by the Commission on July 2, 1970.

increased substitution of clean-burning natural gas for other energy sources having greater air pollution potential. No party questions the validity of the lower court's rationale that a Commission area rate opinion must be based upon an analysis of the effect of prices upon gas supply. The court of appeals decision would return this problem to its origin, the Federal Power Commission. Early denial of all petitions will be the most effective method of returning this case to that forum in order that the agency may take action to minimize the extent and duration of the gas supply crisis.

1. The Nation's Gas Supply.

In its latest area rate decision (and first since its decision under review here), the Commission has aptly described the current status of energy in general and gas in particular:

> "All major sources of energy in the United States are currently in short supply.
>
> * * *
>
> "With declining gas reserves and an increasing disparity between demand and available supply, we are confronted with the unpleasant prospect that consumption of natural gas must be curtailed or end use controls imposed unless additional sources of supply can be found or alternative sources of energy developed to meet demand. There is little prospect that alternative energy sources will reduce the demand for gas in the next decade."[4]

4. On September 18, 1970, the Commission issued its Opinion and Order Determining Just and Reasonable Rates for Natural Gas in the Hugoton-Anadarko Area; Docket Nos. AR64-1, Opinion No. 586. The portion of that opinion dealing with supply and demand appears as Appendix A hereto.

This "increasing disparity between demand and available supply" has long been forecast by this Respondent and other producers. It has been clearly signalled by the decline in gas exploration by 34% since 1960 and the decline of the reserves-production ratio from 20.1 to 13.1 over the 1960-1969 period.[5]

Given the harsh facts of the gas supply shortage, as recognized by the Commission, the important question for this Court is to determine the most efficient and effective method of allowing the Commission to take all lawful action available to avert or minimize this shortage. This Court has emphasized that ". . . Congress has entrusted the regulation of the natural gas industry to the informed judgment of the Commission . . . ." (*Permian Basin Area Rate Cases*, 390 U.S. 747 at 767 (1968).

This informed judgment can be most quickly and efficaciously brought to bear on the gas supply problem by denial of the petitions for writ of certiorari.

2. The Commission Must Be Given Freedom To Re-examine Its Regulatory Methods.

In its *Permian* decision, this Court emphasized:

(1) "area regulation of producer prices is avowedly still experimental in its terms and uncertain in its ultimate consequences." (390 U.S. at 772)

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5. The producer concern over the decline of this ratio has become a stark reality to the entire natural gas industry despite the earlier label of "neurotic preoccupation." (See *Permian*, 390 U.S. at 817, n.103.) At the current level of 13.1, interstate pipelines are ". . . unable to procure contracts for new supplies of gas, on a spot or long-term basis, at the same relative rate as heretofore: . . ." Notice of Rulemaking, R-389A, issued July 17, 1970, p. 1, Appendix B hereto.

(2) the *Permian* proceeding was "to be merely the first of many steps toward a more expeditious and effective system of regulation." (390 U.S. at 772, n.37)

(3) that the Court was "obliged at this juncture to give weight to the unusual difficulties of this first area rate proceeding; we must, however, emphasize that this weight must significantly lessen as the Commission's experience with area regulation lengthens." (390 U.S. at 792)

(4) the Court assumed "that the Commission will continue to examine both the premises of its regulatory methods and the consequences for the industry's future of its rate making orders." (390 U.S. at 816, n.99); and

(5) "We do not suggest that the Commission need not continuously evaluate the revenue and other consequences of its area rate structures. A principal advantage of area regulation is that it centers attention upon the industry's aggregate problems, and we may expect that as the Commission's experience with area regulation lengthens, it will treat these important questions more precisely and efficaciously." (390 U.S. at 822)

In its decision in Opinion No. 546, the Commission placed strong if not complete reliance on the regulatory methods it had earlier adopted in its Permian Basin decision. The current Southern Louisiana decision was issued five months after the Supreme Court had handed down its opinion in *Permian* and the Commission's final opinion on rehearing was a full ten months thereafter. During the period pending rehearing, the Commission was informed from every quarter of the industry of the im-

pending gas shortage and the need for Commission consideration of such fact in its decision.[6]

Despite these admonitions, the Commission's opinion here was a substantial replay of its own Permian opinion without making the reassessments required by this Court. The court of appeals expressed that it was disturbed by the "excessive reliance by the Commission upon the mere *result* of the *Permian* decision" (Cont. App. A, p. 60). The essence of the court of appeals decision was that the Commission had failed to progress in its second area rate case and thus had failed to comply with the requirements of the Supreme Court's *Permian* decision. The court of appeals stated with great specificity the areas where the Commission had failed to improve on its Permian methodology, summarizing to state:

> "It should first estimate the needs of consumer service —in this case, the demand for gas. Next, it should use this determination to fix the level of service at which it is aiming, explaining how that level is related to actual demand in the event demand is not to be fully satisfied. It must then make findings, as specifically as possible, as to how the rate it has set will affect the industry's tendency to meet that level of service." (Cont. App. A, p. 68)

The failure of the Commission's "Permian" regulatory methodology is now widely recognized. The supply trends referred to earlier establish that, insofar as the Commission's Permian decision was the bellwether to the gas producing industry, such methodology has led to a failure of gas supply to meet the Nation's demands.

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6. See Appendices to Petition for Writ of Certiorari filed by The California Company, pp. 56-87, for documentation of these matters.

Now, the Commission itself has recognized that drastic changes in its approach to producer price regulation must take place. It has inaugurated a rulemaking proceeding to establish initial rates for future sales of natural gas for all areas of the Nation.[7] Many parties, including distributors and pipelines, have recommended price increases ranging from 5 to 10¢ per Mcf for various areas of the Nation, including Southern Louisiana.

The voices in judgment of the Commission's Permian methodology now include the Commission's Office of Economics. In an August, 1970 submittal to the Commission in such rulemaking proceeding, this office stated:

> "The recent course of area rate regulation has opened a gap between what is sought and what is actually being achieved. (1) New contract prices are being restrained by ceilings below a level consistent with supply-demand equilibrium in the interstate market. (2) Supplemental supplies are being imported at higher prices than can be offered to domestic producers. (3) At the same time that the regulated interstate market is adjusting to shortages, the unregulated intrastate market, which can pay the necessary price to attract new supplies, is flourishing. (4) Instead of price certainty, regulation has fostered the growth of price expectations which favor the postponement of new dedications of reserves and new capital commitments. Taken together, these developments contain the seeds of a serious regulatory crisis.
>
> "Prompt and decisive Commission action is required to bring order into the regulatory disarray and to prevent long-term resource misallocation in the national economy."[8]

7. This Notice of Rulemaking in this Docket No. R-389A is appended as Appendix B hereto.

8. This submission is reproduced in full in Appendix C hereto.

Finally, the Commission's request to the court of appeals for a remand so "that the Commission can discharge its regulatory responsibilities consistent with the court's opinion" is indicative that the Commission desires to re-evaluate the approach to producer area rate regulation exemplified in its Permian decision.

Under these circumstances, the earliest possible action is required to allow the Commission to commence a new tack in seeking the key to a regulatory method which will ". . . employ price functionally in order to achieve relevant regulatory purposes. . ." (*Permian*, 390 U.S. at 797). This can best be accomplished by denial of all petitions, allowing the affirmance and instructions of the court of appeals to stand.

3. The Court of Appeals has Ample Equitable and Remedial Power to Affirm the Commission's Opinion While Permitting the Commission to Take Action Consistent With the Court's Opinion.

All Petitioners present a question which AGD states succinctly:

> "Whether a reviewing court acting pursuant to §19(b) of the Natural Gas Act may affirm a rate order of the Federal Power Commission, and at the same time exercise general equity powers to authorize the Commission to make retrospective adjustments in the rates fixed by such order."

Humble, in the context of *this case*, unqualifiedly answers the question in the affirmative.

In denying the various petitions for rehearing the court below relied upon the broad equitable and remedial

powers embodied in Section 19(b) of the Natural Gas Act, 15 U.S.C. §717r(b). Thus, it stated (Cont. App. B, p. 2):

> "Under Section 19(b) of the Natural Gas Act, this Court has the broad remedial powers that inhere in a court of equity, and pursuant to our equitable powers we make it part of the remedy in this case that the authority of the Commission to reopen any part of its orders, including those affecting revenues from gas already delivered, is left intact. The Commission can make retrospective as well as prospective adjustments in this case if it finds that it is in the public interest to do so."

MDG, AGD, and NYPSC argue that such action is unlawful. But Section 19(b), which empowers the courts of appeals to "affirm, modify or set aside [a Commission] order in whole or in part," contains a broad grant of equitable jurisdiction and affords ample authority for the court's decision in this case. In this regard, the courts of appeals sitting pursuant to Section 19(b), have equitable and remedial powers coextensive with those of a trial court of original jurisdiction in an injunction suit.[9]

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9. The courts of appeals are courts of inherent equitable power. *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S 4, 17 (1942). Moreover, it has traditionally and consistently been recognized that in reviewing the propriety of and entertaining applications for enforcement of orders of the National Labor Relations Board and the Federal Trade Commission, the courts of appeals exercise equitable jurisdiction and powers, under review proceedings substantially the same as those brought under Section 19(b) of the Natural Gas Act. See, *e.g., NLRB v. Cherry Cotton Mills*, 98 F.2d 444, 447 (5th Cir. 1938) *reh. denied*, 98 F.2d 1021 (1938); *NLRB v. Boss Manufacturing Co.*, 107 F.2d 574, 579 (7th Cir. 1939); and *C. E. Nichoff & Co. v. FTC*, 241 F.2d 37, 42 (7th Cir. 1957) *rev'd on other grounds sub nom.*, 355 U.S. 411 (1958); *New Jersey Wood Finishing Co. v. Minnesota Mining and Manufacturing Co.*, 332 F.2d 346, 355 (3rd Cir. 1964), *aff'd sub nom.*, 381 U.S. 311 (1965).

Thus, it was early held in *Natural Gas Pipeline Co. of America v. FPC*, 128 F.2d 481, 484 (7th Cir. 1942):

> ". . . it [is] well settled that in respect to review of orders of Federal Boards and Commissions, the jurisdiction of the Circuit Court of Appeals, when granted by Congress, is original rather than appellate in character and that, being endowed with original jurisdiction, the court may by its own orders protect the rights of the parties in any manner in which any trial court of equity of general jurisdiction might do so in an injunction suit. [Citations omitted]."

The *Natural* case brings into sharp focus the broad reach of the equitable powers of the courts of appeals when their jurisdiction is invoked under Section 19(b) of the Act. In that case, the court found that it had the equitable power to regulate the disposition of refunds payable as a result of a stay order previously issued by it as well as the equitable power to enjoin the putative recipients of such refunds from prosecuting collateral suits in other forums.

The *Natural* decision makes clear that a court of appeals whose jurisdiction is invoked under Section 19(b) of the Act[10] sits as a court of original jurisdiction and pur-

10. The court in the *Natural* case made clear that its powers derived from the Natural Gas Act, stating:

> "The source and boundaries of our authority must be found in the Natural Gas Act, 15 U.S.C.A. § 717r(b)(c), providing that persons aggrieved by an order of the Commission may obtain a review in the proper Circuit Court of Appeals, which shall have exclusive jurisdiction to affirm, modify or set aside the order in whole or in part, and the judgment of which shall be final, subject only to review by the Supreme Court. . . . Thus the Circuit Court of Appeals is the first forum in which a judicial hearing can be had to determine the legality of the order. In this respect the legislation is similar in its terms and purport to that governing orders of the Federal Trade Commission; the National Labor Relations Board and various other administrative bodies." 128 F.2d 483-84.

suant to its authority to "affirm, modify or set aside" a Commission order, has the equitable power to do complete justice. Since a court has the equitable jurisdiction to ". . . protect the rights of the parties in any manner in which any trial court of equity of general jurisdiction might do so in an injunction suit," 128 F.2d 484, when its jurisdiction is invoked under Section 19(b), a fortiori, a court sitting in such capacity has the inherent power to effect the most perfect remedy.[11]

In *Ford Motor Co. v. NLRB*, 305 U.S. 364 (1939), the Supreme Court recognized this precise principle. There, upon review of a circuit court decision remanding a case to the Labor Relations Board to permit it to set aside its opinion and to make new findings, the Court stated at 305 U.S. 373:

> "The jurisdiction to review the orders of the Labor Relations Board is vested in a Court with equity powers, [i.e., the court of appeals] and while the

11. Even assuming, *arguendo*, that the court below was without inherent equity power or that Section 19(b) did not confer equity power upon it, nonetheless, the court would have ample authority under the All Writs Act, 28 U.S.C. §1651(a) to grant the relief which it did. That Section empowers the courts of appeals to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." The cases are legion in a variety of contexts, that this Act empowers the courts of appeals, when it has jurisdiction of the cause, to issue all writs not specifically provided for by Congress in the enabling legislation when the court finds it necessary "to achieve the ends of justice entrusted to it." *Adams v. United States*, 317 U.S. 269, 272-73 (1942). See, also, *Board of Governors of Federal Reserve System v. Transamerica Corp.*, 184 F.2d 311, 316 (9th Cir. 1950); *cert. denied*, 340 U.S. 883 (1950), where that court of appeals, pursuant to the All Writs Act, and where it had no jurisdiction of the cause, issued an order enjoining the transfer of stock which transfer would have divested the Board of jurisdiction and the court of jurisdiction to enforce any order of the Board.

> court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action. The purpose of judicial review is consonant with that of the administrative proceedings itself,—to secure a just result with a minimum of technical requirements."

The courts of appeals have correctly applied their equitable powers in the past to create innovative remedies. For example, in *Mobile Gas Service Corp. v. FPC*, 215 F.2d 883 (3d Cir. 1954), *aff'd. sub nom, United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956), the Court of Appeals for the Third Circuit "reversed the Commission's order, directed it to reject United's filing of the new schedule insofar as it purported to increase the rate in question, and held Mobile entitled to a return of the amounts paid in excess of the contract rate." 350 U.S. at 337. The court took this action under Section 19(b) which is couched in terms which permit the court to "affirm, modify or set aside" a Commission order.[12]

Moreover, a court of appeals has broader jurisdiction where, as in this case, parties have moved to adduce additional evidence. Thus, Section 19(b) gives the courts express authority to "order such additional evidence to be taken before the Commission and to be adduced upon the hearing *in such manner and upon such terms and conditions as to the court may seem proper.*" (Emphasis

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12. Cf., *Hormel v. Helvering*, 312 U.S. 552, 560 (1941), where the Supreme Court affirmed the decision of the lower court and at the same time ordered further proceedings consistent with its opinion, *i.e.*, it affirmed with directions.

supplied). That is precisely what the court below instructed the Commission to do when it stated:

> "In our original opinion, we indicated that there was new evidence of a possible impending gas supply shortage" (Cont. App. B, p. 1).
>
> * * *
>
> "The appropriate place for originally considering what parts of the orders must be reopened in light of new evidence is before the Commission" (Cont. App. B, p. 2).
>
> * * *
>
> "Or it may be that the refunds are too burdensome in light of new evidence to be in the public interest. In that case, it is our judgment that the Commission shall have the power and the duty to remedy the situation by changing its orders" (Cont. App. B, p. 3).

In substance, the court's "judgment" that the Commission had "the duty" to consider "what parts of its orders must be reopened in light of new evidence" of gas supply shortage constitutes an exercise by the court of its power under Section 19(b) to require the Commission to consider material new evidence and to make such changes in its orders as the new evidence may require.[13]

4. The Disposition of This Case by the Court of Appeals Was Reasonable.

Once it is established that the courts of appeals exercise equitable jurisdiction, their formulation of remedies must

13. NYPSC's assertion that producer motions to adduce were denied "sub silentio" (NYPSC Pet., p. 12, n. 2 and p. 16, n. 5) is obviously unfounded.

necessarily be construed in light of the purposes of the Act and their role in the administrative process.[14]

The court's action in this case must, therefore, be related to and viewed in the context of the unique and critical problem with which it was confronted. Having found that affirmance of the Commission's decision was required but that the Commission made insufficient findings with regard to the relationship of producer rates and supply, the court exercised its inherent equitable and remedial powers to effectuate the best solution possible in the circumstances. It did not improperly arrogate to itself an administrative prerogative or perform an essentially administrative function.[15] Nor did it attempt to transfer its equitable powers to the Commission. See, *Ford Motor Co. v. NLRB*, 305 U.S. at 372.

Here, cognizant of its role in the administrative process, the court below, after a carefully considered opinion, affirmed the Commission's decision but, pursuant to the court's broad equitable powers and consistent with the comity which must exist between court and agency, permitted the Commission to make retrospective as well as prospective adjustments should the public interest so require. Thus, it stated (Cont. App. B, pp. 2-3):

> "At the same time, we emphasize that our judgment is an affirmance and not a remand. The appropriate place for originally considering what parts of the orders must be reopened in light of new evidence is before the Commission. It may be that the Commission will decide that the refunds it has

14. *United States v. Morgan*, 307 U.S. 183, 191 (1939).

15. Cf. *FPC v. Idaho Power Co.*, 344 U.S. 17, *reh. denied*, 344 U.S. 910 (1952); *C. E. Niehoff & Co., v. FTC*, *supra*, at note 9.

> ordered are just and reasonable or at least that their significance to the public interest is outweighed by the confusion and delay that would result from their reopening. In this event, the Commission will allow its refund orders to stand as they are. Or it may be that the refunds are too burdensome in light of new evidence to be in the public interest. In that case, it is our judgment that the Commission shall have the power and the duty to remedy the situation by changing its orders."

Plainly, the court properly exercised the discretion delegated to it by Congress and its action is appropriately related to the underlying purpose of the Act.

Thus, recognizing the complex nature of these area rate proceedings,[16] the lower court's solution providing affirmance but incorporating the rationale to be followed in weighing the interrelationship of supply and price into its remedy is a reasonable solution assuring fairness of the end result under proper court supervision. *Permian Basin Area Rate Cases,* 390 U.S. 747 (1968); *United States v. Morgan,* 307 U.S. 183 (1939); *Niagara Mohawk,*

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16. This area rate proceeding, like the *Permian Basin Area Rate Cases* decided by this Court in 1968, is an immensely complex proceeding involving dozens of parties. The record consists of more than 34,000 pages and over 300 exhibits with a printed joint appendix exceeding 1,000 pages. The proceedings, which were instituted in May, 1961, were not decided by the Commission until September 25, 1968. They involve 252 respondents to investigations under Section 5(a) of the Act and 119 Section 4(e) rate increase proceedings. As noted by the Commission in its Opinion, 84 producer-respondents, 2 State commissions, 10 interstate pipelines, 111 gas distributors and a number of other interested parties participated in the administrative proceedings. At the court of appeals level, the issues remained complex, involving such questions as costing, allocations, rate design, rate of return, rate moratoria as well as the all-prevailing issue of gas supply. The number of participating parties remains at a high level.

Power Corp. v. FPC, 379 F.2d 153, 160 (D.C. Cir. 1967).

The central issue presented to the court below was the effect of the decision on gas supply in the important Southern Louisiana Area as well as the nation. No one can doubt this paramount fact and no court decision can disregard it. All efforts of the gas producing industry and the Commission must be directed toward a swift solution of the deepening gas supply crisis.

In the context of the Commission's failure to provide any meaningful analysis of the effect of price upon supply (Cont. App. A, pp. 46-60) the court took an immensely practical step. It recognized that it could have ordered a limited remand (Cont. App. A, p. 56) but decided that a realistic solution would be expedited by affirmance, while making Commission consideration of the supply issue a part of its remedy (Cont. App. A, pp. 65-70). It was aided in this conclusion by the knowledge that by this time the Commission itself had come to realize that its end result must be directed toward resolution of the supply crisis (Cont. App. A, pp. 56-58). Yet the court below took pains to point out that its mandate "should not, however, be interpreted to interfere with Commission action that would change the rates we have approved here." (Cont. App. A, p. 69) And, on rehearing the court carefully avoided intrusion into the administrative sphere concluding that it is the Commission's function to decide what, if any, modification of Opinion No. 546 is required in light of the court's opinion.

5. The Remedy Provided by the Court of Appeals Does Not Involve "Reparations" or "Retroactive Ratemaking."

MDG, AGD and NYPSC do not contest the soundness of the lower court's opinion insofar as it requires that the Commission consider the relationship of price and supply. Nonetheless, they argue that the Commission is powerless to effect the remedy prescribed by the court of appeals. They would force the Commission, the gas industry, and all dependent upon it to accept a result which cannot be justified by application of standards which even they do not dispute. However their argument is based upon an erroneous premise; to wit, that Opinion No. 546 rates have become fixed, subject only to prospective change. They, therefore, contend that any retrospective modification of Opinion No. 546 rate levels would constitute reparations beyond the power of the Commission. Their argument overlooks the fact that Opinion No. 546 rates have never become effective. Continuous stays have left the Commission free to take the necessary action to effectuate the court of appeals' directives. Thus neither reparations nor retroactive ratemaking are involved.

Importantly, the operative language of the lower court's order on rehearing does not suggest the possibility of retroactive rate-making or reparations. Thus, the court held (Cont. App. B, p. 2):

> "The Commission can make *retrospective* as well as prospective adjustments in this case if it finds that it is in the public interest to do so." (Emphasis supplied).

Under the Natural Gas Act, the difference between retroactive rate-making or reparations and the fixing of

rates on a retrospective basis is clear. Reparations involve the fixing of rates for a past period in substitution for prior rates which had become effective without contingency for modification or change. In sharp distinction, the Commission can and regularly does fix rates on a retrospective basis. Thus, when an increased rate is permitted to go into effect subject to possible refund, the Commission may, after hearing, fix a just and reasonable rate retrospectively to the end of the suspension period; this does not constitute "ordering reparations."

Similarly, and most pertinent here, the Commission may, when it has never permitted rates to go into effect, make appropriate retrospective adjustments in rates as may appear appropriate on the basis of Court review.[17] Since, by reason of its stay, the Commission has prevented the Opinion No. 546 rates becoming effective, the Commission may now take the proper action as may be appropriate under the Court's opinion.

Petitioners who argue that modification of Opinion No. 546 rate levels would result in reparations fail to recognize that the retrospective effect would be the same when, upon completion of review, *any* rates other than those now in effect are made effective as of a prior date. The effect is identical; the only question is whether the rates so given effect are the Opinion No. 546 rates or different rates which might follow from application of the guidelines furnished by the court below. The nature of the Commission action would be identical because present rates are effective subject to possible refund, and Opinion No. 546 rates have never been made effective. Accord-

17. Cf. *United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223, 229 (1965).

ingly, cases such as *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe R. Co.*, 284 U.S. 370 (1932) and *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951), cited by Petitioners, are inapposite, because they involved retroactive changes in rates which had been both established *and* placed in effect.

In the context of the proceedings in this case the distinction between prohibited retroactive rate making and appropriate retrospective action is crucial. Having never made effective any part of the rate reduction or refund orders in Opinion Nos. 546 and 546-A, there can be no "retroactive" character imparted to the post-review actions which the Commission is authorized to take under the court of appeals' opinion.[18]

6. Supreme Court Review is Premature.

Because of the particular circumstances involved, this case presents no issue which is ripe for review. Until the Commission acts to implement the court's opinion, no party can be affected. And, until the Commission acts, no party can foretell which issues, if any, will be relevant. Viewed realistically, there is no final Commission action to which this Court should devote its attention. The Commission's stay of the rate provisions of Opinion No. 546 after the court of appeals' mandate was handed down, its encouragement of settlement negotiations, and its patent

18. *Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958) and *International Union v. Eagle-Picher M. & S. Co.*, 325 U.S. 335 (1945) are not in point for those cases involved collateral attack upon orders which had been unconditionally approved upon review. In contrast, no collateral attack upon the lower court's opinion would be involved here when the Commission follows the court's rationale in relating price to supply to derive the just and reasonable rates applicable in these proceedings.

recognition that a solution must be found to the critical gas supply crisis, all forecast that the Commission will heed the lower court's opinion. When it has done so, the end result may be entirely different from Opinion No. 546. Moreover, denial of certiorari now does not foreclose parties from pursuing their remedies after the Commission issues its final order in this proceeding. Avenues for review will then be open for any aggrieved party to seek to prove error. In this context the overriding public interest clearly demands that all writs of certiorari be denied so that the Commission may proceed immediately to implement the court's decision.

CONCLUSION

WHEREFORE, for the foregoing reasons, Humble requests that all petitions for writ of certiorari in these proceedings be denied.

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APPENDIX A

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

OPINION NO. 586

Area Rate Proceeding, et al. (Hugoton-Anadarko Area)
Docket Nos. AR64-1, *et al.*

OPINION AND ORDER DETERMINING JUST AND REASONABLE RATES FOR NATURAL GAS PRODUCED IN THE HUGOTON-ANADARKO AREA

(Issued September 18, 1970)

(Portion)

Supply and Demand

58. In determining area rates we have been charged by the Court of Appeals for the Fifth Circuit with predicting the probable demand for gas, determining the desired level of supply and attempting to determine a price which will elicit that level of supply. *Southern Louisiana Area Rate Cases, supra.* The court noted that this task was difficult, but said it must nevertheless be attempted by the Commission.

59. All major sources of energy in the United States are currently in short supply. Brown-outs have already occurred in some electric utility distribution areas. Restrictions on gas use have been imposed by distributors in a number of areas and are being considered in others.

The stock-pile reserves of coal for electric utilities are below the level considered by the industry to be a safe operating margin. The installation of nuclear power plants has progressed more slowly than was forecast and it now appears that nuclear power will not be able to ease the increasing demand on fossil fuel for many years. Domestic oil reserves are declining. Low-sulphur coal and oil are in short supply. Desulphurization facilities are lagging behind projected demand to meet stringent air pollution standards, destined to grow more stringent in several major urban areas. Pipelines are unable to obtain the desired supplies of natural gas. In 1968, according to the statistics of the AGA, the national findings of natural gas fell below production. This occurred again to a greater degree in 1969, when only about 8.3 trillion cubic feet were added to reserves while production mounted to 20.6 trillion.

60. The actual growth in demand for gas as reported by the Future Requirements Committee (FRC)[13] in September 1969, was 4.2% in 1965, 6.9% in 1966, 6.5% in 1967, and 9.1% in 1968. In September 1969, FRC estimated the growth rate for 1969 as 7.4%, for 1970 as 6.1% and for 1971 as 5.3%. For the 1970-75 period the average annual growth rate was estimated at 4.3% compounded annually, from 1975 to 1980 at 2.8%, from 1980 to 1985 at 2.9% and from 1985 to 1990 at 3.1%. These growth rates were based upon a survey of distributors throughout the country conducted by the FRC. Each distributor was asked to make projections from its own areas based on anticipated population growth

13. The Committee consists of 26 members drawn from pipelines (11), distributors (6), producers (4), government (5), plus two *ex officio* members from the University of Denver.

and trends in demand based on experience. FRC then compiled all the various predictions to produce its estimates for the future. To obtain production necessary to meet these projected increases would mean that the 20.6 trillion cubic feet production of 1969 would have to increase to about 21.9 trillion in 1970, 23.1 trillion in 1971, and 27.0 trillion in 1975.

61. The FRC figures have customarily been on the conservative side.[14] Virtually all predictions as to energy consumption in the past few years have proven swiftly to be gross underestimates. The Commission Staff Report on National Gas Supply and Demand (September 1969) indicates an average annual growth in demand of about six percent (compounded) since 1964. When projected into the future this average annual growth would result in substantially higher demands than those projected by FRC.

62. The largest single year's addition to natural gas reserves in the United States took place in 1956 when it reached 24.7 trillion cubic feet.[15] This was also a year of the great activity in domestic oil exploration and development in part engenered by disruption of the sup-

15. While reserve additions are extremely inaccurate as a measure of findings in any given year, this maximum figure is almost certainly not too high. In general, statistics as to findings must be averaged over several years to offset the inaccuracies in particular years.

14. It has been noted that the FRC's compilation is based upon data furnished by local distributors. The predictions of local distributors as to expected demands upon them have proved in recent years to be not only too low but very much too low. Independent and industry surveys, and the witnesses who have testified in area rate cases as to the probable demand for gas have unanimously under-estimated the growth in demand, some by 200 percent. The predictions of demand for coal and oil have also been proven to be far short of the reality.

ply of foreign oil. In no later year have total reserve additions exceeded 21.1 trillion cubic feet, the level in 1965 and 1967. We may fairly predict then that the production of natural gas which reached 20.6 trillion cubic feet in 1969 will shortly reach a level above that of any past year's additions to reserves. With declining gas reserves and an increasing disparity between demand and available supply, we are confronted with the unpleasant prospect that consumption of natural gas must be curtailed or end use controls imposed unless additional sources of supply can be found or alternative sources of energy developed to meet demand. There is little prospect that alternative energy sources will reduce the demand for gas in the next decade.

63. The evidence shows that the demand for gas has risen beyond all expectations of a few years ago and that it will rise within a few years to a level that will strain or even exceed the capacity of the industry to meet. This will not mean that those presently using gas will find none available. It does mean that some of those who want to begin to use gas will not be able to do so and that some of those who want to sell gas will not be able to get all they want for all their customers. Incremental supplies will be limited.

64. The situation in the Hugoton-Anadarko area is tied closely to that of the nation as a whole. This area is centrally located. While the greater part of its gas flows northeasterly to the Upper Midwest it could also be used to supply both the East Coast and the Far West. Pipelines which would normally obtain gas from this area have been compelled to go further afield to the Permian Basin. Southern Louisiana, the Texas Gulf Coast and Other

Southwest Areas. The demand upon the Hugoton-Anadarko Area may fairly be considered in terms of the national demand although, if anything, the proportionate demand upon this area would exceed that of the nation as a whole. As the Hugoton-Panhandle Field depletes, new Other Fields must replace it if the flow of gas is to continue at present levels.

65. There is no direct evidence in this proceeding as to what relationship a particular price might have to new gas supplies. Since price is one of the important factors bearing on supply, it is reasonable, therefore, to anticipate greater supplies of gas from an increased level of rates.

APPENDIX B

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

[18 CFR 2.56]

Docket No. R-389A

Initial Rates for Future Sales of Natural Gas for All Areas

NOTICE EXPANDING NOTICES OF INVESTIGATION AND PROPOSED RULEMAKING TO NATIONWIDE NEW GAS SALES AND STATEMENT ON NEW APPLICATIONS FOR CERTIFICATES FOR SALES FROM ALL AREAS

(Issued July 17, 1970)

1. Notice is hereby given, that pursuant to the Administrative Procedure Act, 5 U.S.C. 551, *et seq.* (1967) and Sections 4, 5, 7, 8, 14, 15 and 16 of the Natural Gas Act (52 Stat. 822, 823, 824, 825, 828, 829, 830; 56 Stat. 83, 84; 61 Stat. 459; 76 Stat. 72; 15 U.S.C. 717c, 717d, 717f, 717g, 717m, 717o) and upon an investigation to be conducted in this docket, the Commission desires to expand the scope of the investigation and proposed rulemaking set forth in its notice issued June 17, 1970, in Docket No. R-389, and, therefore, now proposes to issue rules fixing the terms and conditions under which it will issue permanent certificates for, and will otherwise regulate, new sales of natural gas subject to the Commission's jurisdiction nationwide, including but not

limited to the Southern Louisiana, Permian, Other Southwest, Hugoton-Anadarko, Texas Gulf Coast, Appalachian, Rocky Mountain and all other areas (except Alaska and Hawaii), under contracts dated after June 17, 1970. The rates to be set pursuant to this rulemaking will be firm rates, not subject to refund obligation. However: any rate set will be subject to prospective modification at the conclusion of any area rate proceeding which has heretofore been instituted, or which may hereafter be instituted by separate order.

Data available to the Commission indicates that interstate pipelines are unable to procure contracts for new supplies of gas, on a spot or long-term basis, at the same relative rate as heretofore, and that this does not appear to represent any decline in the productivity of the areas below earlier estimates. Recently significant pipeline capacity for intrastate transportation and sales has been put into operation in a number of areas.

2. We do not propose any specific terms and conditions in this notice. Rather, we will rely in making that determination on the responses to be filed herein. We propose to amend section "2.56, Area Price Levels for Natural Gas Sales by Independent Producers," as amended, in Part 2—General Policy and Interpretations, Chapter I, Title 18 of the Code of Federal Regulations.

3. As an aid to interested parties (hereinafter "parties") in preparing responses, and as notice to those who may be examined in this investigation, we set forth specific areas of inquiry, the purpose of which is to determine the terms and conditions which will result in an adequate supply of natural gas for consumers at the lowest rate consistent with maintaining an industry structure capable

of providing, and motivated to provide, service with its attendant risks. See *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968) (hereinafter "*Permian*"); *Austral Oil Co. v. F.P.C.*, ___F.2d___ (Fifth Circuit 1970, slip opinion dated March 19, supplemental opinion reaffirming dated June 16, 1970, No. 27492, *et al.*) hereinafter "*Austral*").

4. First, we call on all parties including staff to submit an estimate of the current, nationwide cost of finding and producing non-associated natural gas. This estimate should be made using as far as possible the costing methods set forth in Commission Opinion Nos. 468 (34 FPC 191-207) and 546 (40 FPC 556-589). An explanation of the methods used in estimating current cost, together with all supporting calculations, shall be attached to the response. New gas cost estimates should be determined at the indicated 12 percent rate of return for purposes of responding to this paragraph 4. However, in their responses to the paragraph 5, the parties will have an opportunity to state any alternative rates of return which they deem more appropriate. The Bureau of Natural Gas has made a preliminary estimate which indicates cost increases in the range of 3-5¢ per Mcf exclusive of any modification in rate of return.

5. Second, we call on all parties to respond on rate of return and other factors discussed by the Supreme Court in *Permian, supra,* and the United States Court of Appeals for the Fifth Circuit in *Austral, supra.*

6. Third, we call on parties to respond on the question of the weight to be given to gas contract prices, terms and inducements or commodity value, in considering producer rates and on the question of whether the market

mechanism in the light of pipeline regulation will adequately protect consumer interests. See *Permian, supra*, p. 795. Any party responding to this issue should either include any information he may have concerning prices and other relevant terms applicable to contracts dated on or after January 1, 1966, for all intrastate sales of natural gas and any information he may have concerning prices and other relevant terms offered (or demanded), but not accepted, for contracts for interstate sale of natural gas in the aforementioned expanded areas (together with the factors believed to be the cause of the failure to contract) or state that no such information is available to him or state the reason or reasons why the information is withheld. Nothing herein shall limit investigation by the staff (pursuant to paragraph 11, *infra*), independent of any responses which may be filed.

7. Public hearings will be held in this expanded proceeding for the purpose of allowing a number of persons, such as small producers to state their views in lieu of filing written comments. These hearings will be held in Midland, Texas on July 29, 1970, at the Midland High School Auditorium; in New Orleans, Louisiana, on August 10, 1970, at Room T 9007, 701 Loyola Avenue; in Denver, Colorado, on August 13, 1970, at the U.S. Post Office Building, 1823 Stout Street; and Pittsburgh, Pennsylvania, on August 14, 1970, Room 2214, 1000 Liberty Avenue. Each of these hearings will commence at 10:00 a.m. local time and shall continue from day to day until recessed by an officer designated by paragraph 11, *infra*.

Any statements taken at a public hearing announced by the Commission or its Secretary will be reduced to written form and will be considered together with the

filed comments in this docket. Any party who wishes to make an oral statement in lieu of filing written comments should file a request with the Secretary on or before July 28, 1970, respectively, if the party desires to appear at the New Orleans, or the Denver, or the Pittsburgh hearing. The request shall state the name, title, and mailing address of the person, the interest he has or represents in this proceeding, and a waiver of the right to file written comments pursuant to paragraph 10, *infra*. Denial of an oral presentation means only that the person should file written comments if he wishes to be heard. Persons whose request is granted will be notified by mail of the date and time allotted. Additional hearings may be held upon notice from the Secretary. Any additional requests to be heard in Midland will be considered if filed on or before July 24, 1970; those who filed on or before July 10 will have their requests considered without further action on their part.

8. The initial notice of investigation and proposed rulemaking covered only the Permian Basin area as geographically defined in Docket No. R-389. This expanded investigation and proposed rulemaking shall make the proceeding nationwide (except Alaska and Hawaii).

9. All statements and submittals in response to this notice shall be under oath, acknowledged by a notary public or comparable official, as follows: (name) being duly sworn, deposes and says that he is (title and organization, if filing in a representative capacity); that he is authorized to verify and file this document, that he has examined the statements contained in the submittal and that all such statements are true and correct to the best of his knowledge, information and belief.

10. Any interested person may become a party to this expanded proceeding by filing with the Secretary on or before July 28, 1970, a notice of intention to respond in writing pursuant to this paragraph. All requests to be heard orally pursuant to paragraph 7, *supra*, will be deemed to be notice pursuant to paragraph 10. Persons who filed a notice of intention to respond or a request for oral hearing pursuant to R-389 before this amendment are parties to the expanded proceeding. The Secretary will thereupon prepare and publish a list of all parties. Parties shall certify that all other parties have been served with a copy of any subsequent filing. Responses in writing concerning this proposed rulemaking (hereinafter "original submittal") shall be filed with the Secretary at the Federal Power Commission, Washington, D.C. 20426, by August 21, 1970, instead of July 31, 1970, as previously scheduled. Any submittal shall state the name, title, mailing address of the person or persons to whom communications concerning this matter should be addressed, the interest in this proceeding, and whether the person filing them requests a conference at the Federal Power Commission. An original and fourteen copies of all submittals shall be filed. Responses to the submittals may be filed not later than September 21, 1970, instead of September 1, 1970, as previously scheduled, in the same form and number as the original submittals (hereafter "reply submittals"). The Commission will consider all such written submittals, responses, and statements taken pursuant to paragraph 7, *supra*, and any report filed by an officer pursuant to paragraph 11, *infra*, before issuing an order in this proceeding.

11. For the purpose of the aforesaid investigation, John W. Williams, E. B. Blackmon, and Paul L. Brady,

Staff Attorneys, are each hereby designated an officer of this Commission and empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence and require the production of any books, papers, correspondence, memoranda, or other records deemed relevant and material to the inquiry, and to perform all other duties in connection therewith as prescribed by law. These officers, or any of them, will preside at hearings provided for in paragraph 7, *supra*, unless otherwise provided by Commission order. However, nothing in paragraph 7, *supra*, shall limit the investigatory power delegated in this paragraph 11 or require that all depositions or other information obtained by subpoena duces tecum be publicly conducted or filed as a submittal in this docket. See 15 U.S.C. 717g. Any report to the Commission made by an officer prior to the Commission's decision in this Rulemaking will be filed as a submittal pursuant to paragraph 10, *supra*.

12. Statement on New Applications for Certificates for Sale of Natural Gas. Effective on June 17, 1970, for the Permian area, and effective on the date of this notice for all other areas, the Commission will accept for consideration applications by independent producers requesting issuance of a certificate of public convenience and necessity for sales of natural gas notwithstanding that the stated rate may be in excess of the ceiling or guideline rates. Applications requesting issuance of certificates of public convenience and necessity authorized herein shall be processed in accordance with the procedural requirements, including those relating to notice, intervention and hearing, set out in Part 157 of the Commission's Regulations under the Natural Gas Act.

Applicants shall state the grounds for claiming that the present or future public convenience and necessity requires issuance of a certificate on the terms proposed in the application.

Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Power Commission by Sections 7 and 15 of the Natural Gas Act and the Commission's Rules of Practice and Procedure, a hearing will be held before the Commission without further notice on all applications for certificates in which no petition to intervene in opposition is filed within the time required if the Commission on its own review of the matter believes that a grant of a certificate is required by the public convenience and necessity. Where a petition for leave to intervene in opposition is timely filed or where the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

13. Notice of investigation, of rulemaking, and statement on New Applications for Certificates for sale of natural gas in this Docket are separable. Termination or stay of any one by order of this Commission or otherwise shall not affect any other proceeding incorporated herein.

14. The Secretary shall cause prompt publication of this notice to be made in the Federal Register.

By direction of the Commission.

Gordon M. Grant,
Secretary

(SEAL)

APPENDIX C

FEDERAL POWER COMMISSION

OFFICE OF ECONOMICS

Initial Rates for Future Sales of
Natural Gas for All Areas
Docket No. R-389A

Submission of the Office of Economics of
the Federal Power Commission

Washington, D. C. 20426

August 1970

The purpose of this response is to recommend for the Commission's consideration a fundamental overhauling of the present program of area rate regulation. The proposal herein described would discard the ratemaking methodology of Opinion Nos. 468 and 546 in favor of new ratemaking criteria which would be implemented through a more flexible procedural mechanism than in the past. A new informational system will be needed and probably also some new procedural safeguards, but the end result will be a substantial simplification compared with the course that has been followed heretofore.

The present proposal is premised on the continuing need for price ceiling regulation over producer sales in interstate commerce and it is designed to achieve realistic regulatory objectives through an efficient market solution,

as opposed to a rationing solution, of supply-demand imbalances. The essence of the proposal is a method of regulation which will facilitate timely adjustments of area rate ceilings, nationwide, to accommodate observed and anticipated market developments affecting natural gas demand and supply. The Commission's actions on rate changes would be backstopped by an expanded staff effort to monitor the results on a current basis and to propose corrective regulatory actions as needed.

Successful area rate regulation should provide these primary benefits: (1) rate ceilings and contract provisions which afford a sufficient inducement for producers to meet current market demand, but which deny them any undue advantage because of possible market imperfections or exceptional bargaining power; (2) a geographical pattern of price differentials which will promote an efficient allocation of productive resources and efficient use of transmission facilities; and (3) orderly markets which will reduce the uncertainties of decision-making by producers, pipelines, distributors, and consumers. These goals, together with the desirability of minimizing the necessary costs of regulation, epitomize the public interest in producer regulation.

As noted earlier, the preferred method of regulation should place primary reliance in the market mechanism to correct existing or emerging supply-demand imbalances. This will require varying the economic incentive for new gas discoveries so that the prospective return from the required future level of gas exploration and development remains competitive with comparable-risk returns elsewhere in the economy. The concommitant effect of any rate change will be either to dampen or encourage the

growth of market demand, thereby lending added support to the desired market adjustment. Because these market responses tend to operate with a substantial time lag, the Commission's decisions on needed rate changes must be fitted into an analytical framework which provides a basis for informed judgment on the probable impact of the new rates on future supply and demand.

The recent course of area rate regulation has opened a gap between what is sought and what is actually being achieved. (1) New contract prices are being restrained by ceilings below a level consistent with supply-demand equilibrium in the interstate market. (2) Supplemental supplies are being imported at higher prices than can be offered to domestic producers. (3) At the same time that the regulated interstate market is adjusting to shortages, the unregulated intrastate market, which can pay the necessary price to attract new supplies, is flourishing. (4) Instead of price certainty, regulation has fostered the growth of price expectations which favor the postponement of new dedications of reserves and new capital commitments. Taken together, these developments contain the seeds of a serious regulatory crisis.

Prompt and decisive Commission action is required to bring order into the regulatory disarray and to prevent long-term resource misallocation in the national economy. The first need is to settle on a fast procedure for increasing the established price ceilings, since the recent course of events offers unmistakable evidence that the allowed wellhead prices no longer satisfy the requirements of the market under present economic conditions. The next step, which is the major concern of this proposal, is to agree on ratemaking standards for the new price ceilings and

for subsequent adjustment of the ceilings to keep pace with changing market circumstances.

The basic ratemaking standard for new gas-well gas in Opinion Nos. 468 and 546 is the estimated national average cost of such gas. In Opinion No. 468, for example, the Commission stated that "a composite cost determination is the bedrock on which a regulated price must be established" (34 FPC 189-190). The instant Docket No. R-389A calls on all parties to provide estimates based on the same cost standard accepted by the Commission in the earlier case. It also cites a preliminary estimate by the Commission's Bureau of Natural Gas, indicating cost increases in the range of 3-5 cents per Mcf based on a 12 percent rate of return.

As explained below, the principle of cost-based pricing for new gas is seriously defective on both conceptual and practical grounds. Moreover, its continued acceptance as a basis for area rate regulation is certain to hobble the regulatory process without being productive of meaningful ratemaking guidelines.

To induce producers to find more gas in the period ahead the Commission must provide an economic incentive for them to explore a wider range of prospects and to be willing to incur higher exploration and development costs. This means that the price increase must precede the cost increase. It follows, therefore, that the use of test-year costs to justify the necessary price to elicit the required additional supply is destined to be self-defeating. The use of test-year costs would also be misleading, but in the opposite direction, in a period of excess gas supply, and it is of course inappropriate whenever costs are changing.

Apart from this fundamental objection to the cost-based pricing principle for area rates, there are serious infirmities inherent in any new gas costing derived by arranging the reported data in a costing format—for example, the circularity running between costs and prices and the absence of historical data directly matching E and D outlays with the resultant reserve findings. Perhaps the most troublesome of all is the joint cost allocation problem. It has no correct solution but only an intuitive one which is discretionary and therefore meaningless as a determinant of the necessary price. Experience has shown that many differences among the various new gas cost estimates can be resolved only by essentially arbitrary decisions which have a major influence on the end result. How, then, can the Commission rely on a new gas cost determination for evidential underpinning of its decision in this proceeding or in future area rate proceedings?

The alternative is to employ a functional or end-result test, not a cost test, in adjusting the area rate ceilings for new gas. In the beginning the Commission should be prepared to proceed by the trial and error method on an avowedly experimental basis. After studying the responses in this proceeding, which will presumably cover the relevant data (see below), and after considering economic analyses of demand and supply prospects under alternative price assumptions, the Commission should exercise its judgment in fixing the new ceilings.

By the time the new ceilings become effective, the monitoring program should be ready to begin operating. It will be important for the Commission to keep informed of new leasing activities and drilling ventures and to collect and analyze firsthand reports of the results of pipe-

line procurement activities. Current reports may also be needed on the status of shut-in wells and other potential sources of uncommitted reserves and near-term increments to available supplies. With experience, the monitoring staff will become increasingly skilled in analyzing the current flow of data on the industry's operations and identifying supply and demand responses. If it is concluded that the market correction is proceeding too slowly and that an inadequate price incentive is contributing to the lag, the new gas rate ceilings could be raised a second time. If there are signs of an overcorrection, the ceilings could be lowered. An adequate working inventory of deliverable gas reserves will of course be needed to absorb temporary supply-demand imbalances. Recognizing that each move is experimental, the Commission should adopt a posture of readiness to react on relatively short notice to the signals from its monitoring system.

The size of the initial and any later ceiling adjustments should be determined after evaluating such information as the following: (1) recent contract prices for competitively negotiated field sales to jurisdictional pipelines; (2) prices in intrastate sales; (3) changes in indexes of production costs; (4) trends in productivity in the producing industry; (5) the strength and composition of market demand; (6) price changes for competitive fuels in important end-use markets; and (7) the general economic environment as it affects the domestic gas producing industry.

The regulatory process will be aided by a major research effort by the industry, as well as the Commission staff, to develop a body of empirical evidence on the response of gas supply and demand to changes in price.

The most promising approach at this time is through the application of econometrics. Several econometric studies have been published in recent years on the supply elasticity of oil, but there are no comparable studies on gas supply elasticity other than the econometric model sponsored by the Commission's Office of Economics in the Permian and Southern Louisiana proceedings. A new econometric model is being completed by the Office of Economics for submission in the pending AR69-1 rate proceeding for Southern Louisiana. Work along this line is also underway in the academic community.

The availability of reliable estimates of the probable market responses to price changes will narrow the range for judgmental decisions in administering the area rate program. Such estimates will permit the Commission to adopt a supply target and tentatively select a pattern of price ceiling adjustments which will yield a national average price appropriate for that target. While a formulary approach, when perfected, should be useful for a first approximation of the necessary ceiling levels, the final decision of the Commission should of course be accommodated to all relevant facts regarding current and prospective market conditions and the need for ceiling changes. An effort should also be made to design econometric analyses for use in the monitoring program.

This proposal of a new approach to area rate regulation is limited to the method of administering ceilings for gas-well gas of a new vintage. A desirable improvement over past practice would be to base the cut-off date between old and new vintage gas on the reservoir discovery date rather than the contract date of the sale. Under conditions of rising cost, it is unnecessary to provide the same price

incentive for new sales of gas from known reservoirs as for sales from reservoirs still to be discovered. Another advantage of a discovery date cut-off is that it would reduce the tendency to postpone contracting for new sales when it appears that the Commission may soon announce a price increase.

The following are other recommendations regarding the implementation of the proposal. First, the initial ceiling adjustment should be sufficiently large to induce a substantial acceleration of exploratory and developmental effort above the recent level. It should also be large enough to convince the producing industry that it is a "once-and-for all" change rather than the first of a series of upward price adjustments. A ceiling change could have perverse effects if it created expectations of still higher prices a year or two hence. Second, it should be recognized that producers are handicapped in their investment planning when they are faced with regulatory uncertainty. One way to reduce such uncertainty would be for the Commission to follow a policy of not ordering future price reductions below the initially certificated selling price. Third, the ceiling price adjustments should be extended simultaneously, or nearly so, to all major producing areas, with appropriate allowances for the locational value of the gas in each area. Because the Nation's requirements for additional gas supplies can be decided rationally only in a national context, the Commission should utilize the supply-eliciting effectiveness of higher ceilings evenly in all potential sources of domestic supply. The pattern of area rate ceilings should not provide extra inducements to divert exploratory effort to a particular area unless that area is demonstrably superior to other

areas from the standpoint of potential supply and its location relative to the principal interstate markets. A price high enough to elicit maximum supplies in one area may be wasteful of resources if part of the needed gas can be obtained in other areas at a lower cost to consumers.

Finally, it is appropriate to observe that action by the Commission to increase the area rate ceilings may need to be supplemented by other measures. The rate design of pipeline tariffs should be reexamined to be certain that higher-priced new vintage gas will not be sold to interruptible customers at less than the incremental cost. In addition, the Commission and the Department of Justice should consider whether there is a need for closer surveillance over merger activities and potentially anticompetitive business practices of companies engaged in gas production and transmission. Especially in a period of gas supply shortages, the public interest objectives of the area rate program are vulnerable to being thwarted if there are undue concentrations of market power or other possible interferences with the operation of competitive forces.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Nos. 669, 680, 682, 683, 684, 685, 691, and 692

Supreme Court, U.S.
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E. ROBERT SEAVER, CLERK

Southern Louisiana Area Rate Cases

MUNICIPAL DISTRIBUTOR GROUP, *ET AL.*,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

MOTION OF UNITED DISTRIBUTION COMPANIES FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN RESPONSE TO PETITIONS NOS. 669, 680, 682, 683, 684, 685, 691, and 692 AND BRIEF AMICUS CURIAE FOR UNITED DISTRIBUTION COMPANIES IN OPPOSITION TO CERTIORARI

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IN THE

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Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

MOTION OF UNITED DISTRIBUTION COMPANIES FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN RESPONSE TO PETITIONS NOS. 669, 680, 682, 683, 684, 685, 691, and 692

The following companies are herein referred to as United Distribution Companies:

AMERICAN NATURAL GAS SYSTEM
Michigan Consolidated Gas Company
Wisconsin Gas Company

CENTRAL ILLINOIS LIGHT COMPANY

CENTRAL ILLINOIS PUBLIC COMPANY

CITIZENS GAS AND COKE UTILITY

THE DAYTON POWER & LIGHT COMPANY

EQUITABLE GAS COMPANY

ILLINOIS POWER COMPANY

MICHIGAN GAS UTILITIES COMPANY

(List of Companies continued on next page)

COLUMBIA GAS SYSTEM
Columbia Gas of Kentucky, Inc.
Columbia Gas of Maryland, Inc.
Columbia Gas of New York, Inc.
Columbia Gas of Ohio, Inc.
Columbia Gas of Pennsylvania, Inc.
Columbia Gas of West Virginia, Inc.
Ohio Valley Gas Company
Virginia Gas Distribution Company

CONSOLIDATED NATURAL GAS SYSTEM
Consolidated Gas Supply Corporation
The East Ohio Gas Company
The Peoples Natural Gas Company
The River Gas Company
West Ohio Gas Company

CONSUMERS POWER COMPANY

NATIONAL FUEL GAS SYSTEM
Iroquois Gas Corporation
Pennsylvania Gas Company
United Natural Gas Company

NIAGARA MOHAWK POWER CORPORATION

NORTHERN ILLINOIS GAS COMPANY

ORANGE & ROCKLAND UTILITIES, INC.

THE PEOPLES GAS SYSTEM
North Shore Gas Company
The Peoples Gas Light & Coke Company

SOUTH CAROLINA ELECTRIC & GAS COMPANY

United Distribution Companies (UDC) is an *ad hoc*, voluntary group of 31 distribution utilities listed above serving approximately 10,300,000 customers at retail in the States of Illinois, Indiana, Kentucky, Maryland, Michigan, New York, Ohio, Pennsylvania, South Carolina, Virginia, and West Virginia. The principal cities and metropolitan areas wholly dependent on members of the United Distribution Companies group for their supplies of gas include Albany, Buffalo, Chicago, Cleveland, Columbus, Dayton, Detroit, Indianapolis, Milwaukee, Pittsburgh, and Syracuse. The population dependent upon the group of distribution companies is estimated to be 48,000,000 people. The United Distribution Companies Group represents approximately 25% of the gas distribution operations throughout the whole United States.

The bulk of the natural gas supplies of UDC is purchased from the major interstate pipeline companies, which in turn secure major portions of their supplies by

purchase from independent producers who operate in the *Southern Louisiana Area* and who are Respondents in the Southern Louisiana area rate cases here sought to be reviewed.

Because of the current and worsening gas shortage and of their inability to secure requisite supplies of additional gas from their pipeline suppliers, the United Distribution Companies are participating, as intervenors, in the new area rate proceeding now being conducted at Federal Power Commission Docket No. AR69-1.

Active participation in the new area rate proceedings at Docket No. AR69-1 during recent months has convinced the United Distribution Companies that the pressing supply problems facing the nation cannot adequately be dealt with and overcome solely through the prescription of higher prospective rates. Such companies are convinced that the problem can be dealt with fully and adequately only through reconsideration by the Commission of all rate and refund issues determined in its initial *Southern Louisiana Area* rate decision.

Through a brief *amicus curiae* submitted in connection with the petitions for rehearing, the UDC Companies urged the court below to remand the case to the Commission for further consideration in the light of the supply situation. While the court below affirmed the Commission, it reserved to the Commission the extraordinary power to reopen and change its order. And the issue now presented to this Honorable Court is whether this disposition by the court below should be reviewed or whether the Commission should first be permitted to reconsider and change its rate fixing order in the light of the supply situation.

United Distribution Companies believe the views they seek to present to this court will contribute to a proper resolution of the troublesome issues before this

Court and for the benefit of the ultimate consumers for whom they seek to assure not only just and reasonable rates but also adequate supplies.

WHEREFORE, United Distribution Companies respectfully request this Court to permit them to file the brief *amicus curiae* which is submitted herewith.

Respectfully submitted.

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MUNICIPAL DISTRIBUTOR GROUP, *ET AL.*,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

BRIEF AMICUS CURIAE FOR UNITED DISTRIBUTION COMPANIES IN OPPOSITION TO CERTIORARI

United Distribution Companies hereby submit their brief in opposition to the Petitions filed in Nos. 669, 680, 682, 683, 684, 685, 691, and 692 for writs of certiorari to review the judgment of the United States Court of Appeals entered in this case on March 19, 1970.

OPINIONS BELOW

The opinion of the Court of Appeals, which is included in Continental Appendix A, pp. 1-70, and is

opinion on petitions for rehearing, which is set forth in Continental Appendix B, pp. 1-3, are not yet reported.[1] The opinions of the FPC are reported at 40 FPC 530 and 40 FPC 301. The opinion of the hearing examiner is reported at 40 FPC 703.

JURISDICTION

The judgment of the Court of Appeals was entered on March 19, 1970, and modified and clarified by an order denying petitions for rehearing entered on June 16, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether this Honorable Court should issue its Writ of Certiorari to review the action of the Court of Appeals in this most extraordinary case, where (1) the Court of Appeals affirmed the rate fixing order of the Commission reluctantly and with "misgivings" in the light of a dangerous supply situation, (2) the Court of Appeals specifically authorized the Commission, as part of the remedy of the case, to reopen its rate order and make such adjustments therein as the "public interest" may require, and (3) the Commission has not yet had an opportunity to act in the public interest pursuant to the mandate of the Court of Appeals.

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[1] In No. 680, Continental Oil Company, *et al.*, Petitioners, filed appendices to their petition containing the complete text of opinions and judgments below as well as the agency's opinions and statues involved.

STATUTE INVOLVED

Sections 4(a), 4(e), 5(a), 16 and 19(b) of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717-717w, are involved and are reproduced at Continental Appendix F, pp. 1-8.

STATEMENT

The statement of Continental Oil Company *et al* at Docket No. 680 includes a full analysis of the decisions of the Federal Power Commission and of the Court of Appeals and for the sake of brevity we adopt that statement of the case, and make the following additional statements:

When petitions for rehearing were filed, the Court of Appeals questioning *inter alia* whether the Commission could modify the affirmed order since it does not have the power to make rates retroactively, directed the Commission to respond to questions as to whether: (a) the Commission could stay, modify, and rescind an order that had been affirmed; and (b) the Court had equitable powers to affirm while preserving the Commission's power to stay, modify, or rescind.

The Commission took the position that it would not have authority to make any retroactive increases or decreases in a rate order unless authorized to do so by the Court. It stated that the question with respect to "equitable powers" had not been decided. In conclusion, the Commission, by a 3 to 2 vote, requested the Court to remand the case so the Commission could discharge its responsibilities consistent with the Court's opinion.

On the petitions for rehearing, the Court again affirmed the order and stated:

> "We wish to make crystal clear the authority of the Commission in this case to reopen any

part of its order that circumstances require be reopened. Under section 19(b) of the Natural Gas Act, this Court has the broad remedial powers that inhere in a court of equity, and pursuant to our equitable powers we make it part of the remedy in this case that the authority of the Commission to reopen any part of its orders, including those affecting revenues from gas already delivered, is left intact. The Commission can make retrospective as well as prospective adjustments in this case if it finds that it is in the public interest to do so.

"At the same time, we emphasize that our judgment is an affirmance and not a remand. The appropriate place for originally considering what parts of the orders must be reopened in the light of new evidence is before the Commission. It may be that the Commission will decide that the refunds it has ordered are just and reasonable or at least that their significance to the public interest is outweighed by the confusion and delay that would result from their reopening. In this event, the Commission will allow its refund orders to stand as they are. Or it may be that the refunds are too burdensome in light of new evidence to be in the public interest. In that case, it is our judgment that the Commission shall have the power and the duty to remedy the situation by changing its orders.

"In all other respects, the original opinion of this Court is the final disposition of this appeal."

Promptly after issuance of the Court's order on June 16, 1970, the Commission entered an order on July 2, 1970, staying its own orders, effective upon dissolution of the Court's stay. Such order is still in effect.

United Distribution Companies have been active in hearings before the Commission in the new *Southern Louisiana Area Rate Case*, AR69-1. Executives of the various United Distribution Companies have testified with respect to the present gas shortage. A United Distribution Companies witness from the financial community also has testified with respect to the enormous capital requirements of the energy industries if the energy requirements of this country are to be met during this decade.

United Distribution Companies propose to participate actively before the Commission in any reopening of the *Southern Louisiana Area Rate Case* here under review.

ARGUMENT

In the presence of the natural gas shortage now facing the Nation, we cannot sufficiently emphasize the importance of this case to natural gas distribution utilities, to the millions of consumers dependent upon them for utility service, and indeed to the public welfare.

The rates fixed for the Southern Louisiana Area must be adequate to provide producers with an incentive to devote immense new quantities of capital to exploration and development and bring the necessary new supplies into the interstate market. A wrong decision upon any part of this whole problem, including the ordering of unduly burdensome refunds, can have disastrous consequences for the interstate consumers.

When the hearings in the *Southern Louisiana Area Rate Case* concluded more than five years ago, hardly anyone foresaw the current gas supply shortage. Although some signs of an impending gas shortage were visible by the time the Commission issued the Opinions and Orders now under review, the full magnitude of the problem was not readily apparent.

By the time that the case reached the Court of Appeals on review, however, the situation had been somewhat clarified. *A Staff Report on National Gas Supply and Demand*, issued in September 1969, was before the Court; and the Court refers to fact that it shows; "perhaps a certainty, that the supply of gas is dangerously low" (Continental Appendix A, p. 52).

The Court of Appeals recognized that this Court held in *Permian* (*Permian Basin Area Rate Cases*, 390 US 747 (1968)) that "adequate findings" would be required in the future, but noted that the Commission had left gaps similar to the omissions criticized by this Court in *Permian*. Thus, the Court of Appeals found ". . . the Commission failed to approach supply and demand in either a semi-quantitative or qualitative way" (Continental Appendix A, pp. 49-50), and listed defect after defect in "findings" on related questions of supply, demand, and actual availability of capital to the industry at rates prescribed (Continental Appendix A, pp. 52-69). The court also noted existence of more current data available to the Commission, including the study by the Commission's Staff released in September, 1969, which indicates "perhaps a certainty, that the supply of gas is dangerously low" and "a serious shortage, in fact, may already be unavoidable" (Continental Appendix A, p. 52). In sum, the court found that the assessment of the crucial facts as to supply, demand, and impact of prescribed rates called for by *Permian* had not been made in this case.

The Natural Gas Act, in addition to obligating the Commission to fix "just and reasonable" rates, requires that rates be fixed at levels consistent with the maintenance of an adequate level of service. *Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378 (1959). The Commission, thus, has a duty to set rates at levels which will obtain the gas needed by interstate consumers. But, it is apparent that the ceiling prices established for the Southern Louisiana Area are inadequate to meet the projected demands. Higher prices will play a vital role in encouraging producers to search for, develop and produce new reserves and in inducing them to dedicate such reserves to the interstate marketplace. Conversely, price "rollbacks" and unduly burdensome refunds will discourage these activities by drawing off capital badly needed for the expansion of exploration and production.

If the rates fixed under Opinion Nos. 546 and 546-A are placed into effect, it is estimated that the producers will be required immediately to refund $375 million at a time when capital is scarce and expensive.[2] To impose such an obligation on the producing industry would drastically reduce the already limited amount of new capital needed to finance new exploratory ventures and would accentuate the present shortages.

The opinions of the Court of Appeals are shot through with expressions of concern over the worsening supply situation and over the probability that the ordered rates and refunds will not provoke its correction. Plainly, the court concluded that further Commission action, through the application of its expertise to the

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[2] The Commission order was based primarily on 1960 data and did not give material recognition to the inflation of the 1960s. The gas requirements of the 1970s cannot be met at the revenue levels of the late 1950s.

developed demand and supply problem, is the best and most effective manner of responding to the situation in the public interest.

Plainly, also the Commission, in the light of the Staff Report and other data now available, shares this deep concern and desires to act, for it requested a remand of the case.

In our opinion, further action by the Commission, well grounded on proper findings as to the supply and demand problem, and as to the bearing of rates and refunds upon its solution, is essential in the public interest; and, until such action is taken, we believe that further review of the case is premature.

WHEREFORE United Distribution Companies respectfully suggest that the public interest will be best served if this Honorable Court denies the Petitions for Writs of Certiorari presented herein.

Respectfully submitted,

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October 14, 1970

CERTIFICATE OF SERVICE

I hereby certify that I have this day mailed a copy of the within Motion and Brief *Amicus Curiae* to the Federal Power Commission and to each of the Petitioners for Writs of Certiorari in the above dockets.

C. William Cooper

October 14, 1970

In the Supreme Court of the United States

OCTOBER TERM, 1970

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No. 669

MUNICIPAL DISTRIBUTOR GROUP,
Petitioner,

vs.

FEDERAL POWER COMMISSION, *et al.*,
Respondents.

No. 691

ASSOCIATED GAS DISTRIBUTORS,
Petitioners,

vs.

AUSTRAL OIL COMPANY, *et al.*,
Respondents.

No. 692

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner,

vs.

AMERADA HESS CORPORATION, *et al.*,
Respondents.

Brief for Respondent The California Company, a Division of Chevron Oil Company, in Opposition

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vs.

AMERADA HESS CORPORATION, *et al.*,
Respondents.

Brief for Respondent The California Company, a Division of Chevron Oil Company, in Opposition

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The California Company, a division of Chevron Oil Company, petitioner in No. 682, respectfully submits this brief in opposition to the petitions for writs of certiorari in the above-entitled cases.

ADDITIONAL STATEMENT OF FACTS

At pages 4-12 of our petition for a writ of certiorari herein (No. 682), and in the appendix to that petition, we set out the facts concerning the present critical gas shortage, the deficiencies in the findings of the Commission pointed out by the court below and the facts, relevant to review by this Court, which have occurred since the decisions of the Commission and of the court below. We respectfully re-emphasize those facts and call the Court's attention to additional relevant events which have occurred since the filing of our petition:

1. On September 18, 1970, the Commission issued its Opinion and Order Determining Just and Reasonable Rates for Natural Gas Produced in the Hugoton-Anadarko Area.[1] A copy of this Opinion and Order is printed in Appendix A to this petition.[2] This decision of the Commission is particularly significant for the following reasons:

(a) The Opinion and Order recognized that the administrative proceedings in the instant case are incomplete and that the Commission has been charged by the Court of Appeals in this case with determining just and reasonable rates which will elicit the required level of supply of gas:

"In *Southern Louisiana Area Rate Cases*, ...F. 2d ....., the Court of Appeals for the Fifth Circuit stressed the need for the Commission to review its cost computations in the light of demand, supply and the effect of the prices established" (App. A 6).

"In determining area rates we have been charged by the Court of Appeals for the Fifth Circuit with predicting the probable demand for gas, determining the

1. The Hugoton-Anadarko Area is a large gas producing area in Kansas, Oklahoma and Texas.

2. References to the appendices hereto are abbreviated herein as follows: "App. A ...." or "App. B ....."

desired level of supply and attempting to determine a price which will elicit that level of supply. *Southern Louisiana Area Rate Cases, supra.* The court noted that this task was difficult, but said it must nevertheless be attempted by the Commission" (App. A 23).

(b) The Opinion and Order re-emphasized the serious gas supply situation which the Court of Appeals held had been given inadequate—indeed, no—consideration by the Commission in this case:

"All major sources of energy in the United States are currently in short supply. Brown-outs have already occurred in some electric utility distribution areas. Restrictions on gas use have been imposed by distributors in a number of areas and are being considered in others. The stock-pile reserves of coal for electric utilities are below the level considered by the industry to be a safe operating margin. The installation of nuclear power plants has progressed more slowly than was forecast and it now appears that nuclear power will not be able to ease the increasing demand on fossil fuel for many years. Domestic oil reserves are declining. Low-sulphur coal and oil are in short supply. Desulphurization facilities are lagging behind projected demand to meet stringent air pollution standards, destined to grow more stringent in several major urban areas. Pipelines are unable to obtain the desired supplies of natural gas. In 1968, according to the statistics of the AGA, the national findings of natural gas fell below production. This occurred again to a greater degree in 1969, when only about 8.3 trillion cubic feet were added to reserves while production mounted to 20.6 trillion" (App. A 23).

"The evidence shows that the demand for gas has risen beyond all expectations of a few years ago and that it will rise within a few years to a level that will strain or even exceed the capacity of the industry to meet" (App. A 25).

(c) The Opinion and Order refers to the comments of the Court of Appeals in this case concerning an earlier settlement proposal herein which was rejected by the Commission:

"The Court of Appeals also dealt with the settlement offer rejected by the Commission in Southern Louisiana, and Commissioner Carver's dissent advocating the adoption of that settlement proposal as being within the 'zone of reasonableness':

'In light of the imprecision of costs, broad support for the settlement, evidence that the market has at least a procompetitive structure, and cumbersome nature of price regulation, it may be that the settlement arguments advanced by Commissioner Carver are persuasive. In this case, the settlement is championed by the producers, and before the Commission it was supported by gas distributors (whom we classify as representing consumer interests) accounting for over 87 percent of delivery volume .... Widespread use of the settlement technique would result in negotiation pitting market forces against each other on an aggregate scale, overseen by the Commission.'" (App. A 6-7).[3]

(d) The Opinion and Order, after careful consideration of the merits and appropriate findings based on the record, effectuated a settlement proposal agreed to by a majority of the parties, despite the opposition of two municipalities, a State Commission and a municipal distributor group (App. A 2). The Opinion and Order terminated area rate proceedings which had extended over more than six years. The Commission found:

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3. This quotation by the Commission from the opinion of the Court of Appeals appears in the footnote at page 46 of Appendix A to the petition in No. 680 by Continental Oil Company, et al. References to the appendices to that petition are abbreviated herein as follows: "Cont.App. ...." or "Cont.App. B ....."

"Having examined each provision of the proposed settlement upon its merits, we find that the proposal as a whole is in the public interest, and should be made the order of this Commission. It is fair to the consuming public, and will promote certainty and stability and reduce administrative burdens by reduction of contested issues. Adoption of the proposal will contribute to obtaining additional supplies of gas from this crucial area, and contribute to cooperation in the attempt to deal with the problems of gas supply. For all these reasons, the settlement proposal should be adopted" (App. A 22-23).

2. On September 29, 1970, the Commission handed down its Opinion and Order on Rehearing in the Texas Eastern Transmission Corporation Case (Opinion No. 565A).[4] That case involves a sale of gas from the Southern Louisiana area which was not consolidated in the instant proceedings. In its Opinion and Order the Commission recognized that the administrative proceedings in the case at bar are incomplete and held that "the just and reasonable rates which ultimately flow out of any settlement, or further proceedings in AR 61-2, or AR 69-1, should govern the level of payments in this case prior to October 1, 1968, as well as after that date" (App. B 2).

3. In our petition for a writ of certiorari in No. 682, we pointed out (p. 13, n. 15) that further settlement discussions in the case at bar were scheduled for September 14, the day our petition was filed. Those discussions, under the chairmanship of a representative of the Commission and participated in by all interest groups—producers, pipelines, distributors, state commissions and the Commission's Staff—continued throughout the week of September 14.

4. The pertinent excerpt from that opinion is printed in Appendix B to this petition.

After a short recess, they were resumed on September 29. On October 2, a substantial number of the parties, including the Commission's Staff, reached agreement in principle on the major issues under consideration, including, specifically, Southern Louisiana area rates to be effective both before and after October 1, 1968, and the amount and disposition of refunds. The most significant features of the agreement are provisions designed to stimulate discovery of new reserves. The proposed order would provide incentives for the discovery and dedication of new gas to the interstate market, both by providing a credit against refunds to producers for new gas which the producers commit to the interstate market and by an increase in rates which the industry can realize only when it shall have discovered and dedicated a fixed amount of substantial new reserves. A drafting committee under the chairmanship of a member of the Commission's Staff, and composed of representatives of all the interest groups, met on October 7 and 8. They are scheduled to meet again on October 15, and hopefully, shortly thereafter, will have drafted a final settlement agreement for submission to the Commission for its consideration and review.

ARGUMENT

I

We respectfully submit that the petitions of the Municipal Distributor Group, the Associated Gas Distributors and the Public Service Commission of the State of New York, Nos. 669, 691 and 692, respectively, are without merit. Each of these petitions questions the power of the court below to include in its judgment a provision that the Commission shall have power to reopen its orders and to make such new

orders as it deems in the public interest, taking into consideration the admonitions of the Court of Appeals and the new evidence relating to the critical gas shortage.

The question thus presented, we submit, is not substantial.

Each petitioner in Nos. 669, 691 and 692 argues the case as though it presented the question whether the Commission has power, after an unqualified affirmance of a rate order by a Court of Appeals, thereafter to change the rates so fixed and so affirmed. No such question is here presented. The court below provided that under its "judgment" the Commission "shall have the power and the duty to remedy the situation by changing its orders,"[5] and further provided that "Our affirmance of the Commission's orders is structured so as to allow the Commission great flexibility in dealing with this problem [the gas supply shortage],"[6] and that a "part of the remedy in this case"[7] is that the Commission shall have the authority "to reopen any part of its orders, including those affecting revenues from gas already delivered."[8] No one of the authorities cited in the petitions in Nos. 669, 691 and 692 has any relevance to this situation. The Court's power to enter such a judgment, and the Commission's power to act responsively to that judgment, is demonstrated in the brief for Texaco, Inc., et al., and the brief of Humble Oil and Refining Company, both of which are being filed herein in opposition to the petitions in Nos. 669, 691 and 692. We adopt the argument on this point in those two briefs.

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5. Cont. App. B 3.
6. Cont. App. B 1.
7. Cont. App. B 2.
8. Cont. App. B 2.

II

Many of the parties to the petitions and cross petitions in this case have submitted that the appropriate procedure for this Court to take at this premature stage of the proceedings is to deny all petitions for writs of certiorari. We agree that review by this Court of any part of the decision of the court below clearly is premature at this time. The administrative process has not been completed. The events related in our petition for a writ of certiorari, and in the statement of additional facts set forth above, indicate that a further order of the Commission in these proceedings, establishing just and reasonable rates for the past and for the future, will be entered. This order will give effect to the agreement of the parties thereto insofar as the agreement shall propose rates which the Commission finds are just and reasonable. In this regard, it is important to bear in mind that the Commission and its Staff have before them voluminous current evidence on both costs and supply in the proceeding it instituted in 1969 (AR 69-1) and which is companion to the proceedings in this case.

Following the issuance of the new order, most of the issues now presented on this vast record—which so deeply concerned the court below and which were treated at length in its 70-page opinion—undoubtedly will have disappeared from the case. The issues contested on the new record, if any, undoubtedly will be different or much more narrow. Further, the intermediate appeal, if any, from that order to the Court of Appeals may resolve all such issues and, in any event, will give this Court the benefit of the consideration of the new issues by the court below.

In these circumstances, it is understandable that many parties contend that all petitions for writs of certiorari should be denied. Nevertheless, we submit that the disposi-

tion of the case suggested in our petition for a writ of certiorari (No. 682) is the appropriate action for this Court to take. Thus far, the Commission has not yet entered an order, as prayed by this petitioner and others, reopening the proceedings in this case. While the settlement proposal gives every practical assurance that a new order will be entered, particularly in view of the leadership of the Commission's Staff in achieving an agreement, it is still *possible* for the Commission, under the judgment of the court below, to take no further action. This would be contrary to law and catastrophic to gas consumers and the gas industry. Since, on this unusual record, this possibility still exists, we submit that the appropriate action for this Court to take is to grant all petitions for writs of certiorari and summarily remand the case to the court below, with instructions to that court to supplement its judgment by directing the Commission to reopen the case and proceed to such orders as it deems in the public interest. Such disposition of the case will preserve to each party its right to have reviewed by the Court of Appeals or by this Court any question now presented, either on this record or, if still relevant, on the expanded record upon which the new order is based.

Of course, if prior to this Court's action on the petitions for writs of certiorari herein, the Commission should enter order reopening these proceedings, then, we would submit,

the appropriate action for this Court would be to deny all petitions for writs of certiorari at this premature stage of the case.

Dated: October 14, 1970.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The within brief in opposition has been served in accordance with Rule 33 by mailing three (3) copies thereof, air mail, postage prepaid, to all counsel of record and to the Solicitor General of the United States this 13th day of October, 1970.

An Attorney for Respondent

(Appendices Follow)

APPENDIX A

United States of America
Federal Power Commission

Before Commissioners: John N. Nassikas, Chairman; Lawrence J. O'Connor, Jr., Carl E. Bagge, John A. Carver, Jr., and Albert B. Brooke, Jr.

Area Rate Proceeding, *et al.* (Hugoton-Anadarko Area)	Docket Nos. AR64-1, *et al.*

OPINION NO. 586
OPINION AND ORDER DETERMINING JUST AND REASONABLE RATES FOR NATURAL GAS PRODUCED IN THE HUGOTON-ANADARKO AREA
(Issued September 18, 1970)

Nassikas, Chairman:

1. By its order of November 27, 1963, 30 FPC 1354, 28 Fed. Reg. 12,645, the Commission undertook to determine the just and reasonable prices for gas sold in interstate commerce by independent producers of natural gas from the Hugoton-Anadarko area. After hearings held jointly in this proceeding and in *Texas Gulf Coast Area Rate Proceeding*, AR64-2, a proposed initial decision by Presiding Examiner Max L. Kane was issued on September 16, 1968. Exceptions were filed by participants listed in Appendix A to this Opinion and Order.

2. On May 24, 1968, a "settlement" proposal was filed by a group of producers. Opposition to this proposal was filed by the Public Utilities Commission and State of California (California), a group of California distributors and the cities of Chicago, Los Angeles, San Francisco, and Denver

and the Public Service Commission of the State of Colorado. On October 31, 1969, the Commission heard joint oral argument in this proceeding and the *Texas Gulf Coast Area Rate Proceeding*. On January 29, 1970, after extended settlement conferences, a new settlement proposal was filed, formally opposed only by California,[1] Chicago and Denver. American Public Gas Association, an association of approximately 200 municipal distributors, joined in Denver's opposition.[2]

The Initial Decision

3. The initial decision was issued prior to our Opinions and Orders in the *Southern Louisiana Area Rate Proceeding*, 40 FPC 530, 41 FPC ..... Examiner Kane ably summarized the evidence concerning characteristics of the Hugoton-Anadarko area, where gas is divided between the ancient, shallow, low-pressure Hugoton-Panhandle Field and the so-called Other Fields, which are newer, deeper and of higher pressure than the Hugoton-Panhandle Field. The initial decision established one set of prices for "new gas" from all fields and "old gas" from the Other Fields and another set of prices for "old gas" from the Hugoton-Panhandle Field.[3]

4. Base area rates for new gas and old Other Field gas (at 14.65 psia) at the wellhead were fixed by Examiner Kane

1. California consumers are concerned with between seven and nine percent of the gas sold in the interstate market in the Hugoton-Anadarko area.

2. The American Public Gas Association had filed neither exceptions nor answers to exceptions and had not participated to any extent in the hearings, although it was a formal intervenor.

3. "New gas" is gas-well gas, or residue gas derived therefrom sold under contracts dated on or after January 1, 1961; "old gas" is gas-well gas sold under contracts dated before January 1, 1961, or residue gas derived therefrom, and all casinghead gas or residue gas derived therefrom regardless of the date of the contract.

at 17.5 cents per Mcf in Texas Railroad District No. 10, 17.1 cents per Mcf in Oklahoma, and 16.3 cents per Mcf in Kansas. The base area rate for old gas from the Hugoton-Panhandle Field (at 14.65 psia) at the wellhead was 12.1 cents per Mcf in Texas District No. 10, 11.9 cents per Mcf in Oklahoma and 11.3 cents per Mcf in Kansas. Under the initial decision, a gathering charge was allowed, one cent for gas from the Other Fields in Texas District No. 10, 1.1 cent from the Other Fields in Oklahoma and Kansas, and 1.9 cent for gas from the Hugoton-Panhandle Field in all three states.

5. Quality and delivery pressure standards were established and a minimum rate was set. A moratorium of 2½ years was imposed, and refunds (plus interest) were ordered of all amounts collected in excess of the applicable area rates and subject to refund in consolidated Section 4(e) cases, such refunds however, to be retained or escrowed by the producer until suitable flow-through arrangements were approved.

The Settlement Proposal

6. The settlement proposal of January 29, 1970, was joined in by 27 independent gas producers.[4] The proposal is appended to this order as Appendix B. On February 3, 1970, the Commission noticed the proposal and provided for the filing of comments or objections by March 2, 1970 (35 Fed. Reg. 2753). Statements of support were received from twelve producers, Texas Independent Producers & Royalty Owners Association (TIPRO), Oklahoma Independent Petroleum Association (OIPA), seven pipelines

4. All participants were represented at one or more of the settlement conferences except California, Los Angeles and San Francisco.

(purchasers of 91.26 percent of the gas sold in the area subject to our jurisdiction),[5] the Northern Distributor Group[6] and Northern Illinois Gas Company (distributor to over a million customers in Illinois, including suburbs of Chicago). The producers proposing and supporting the settlement were responsible for 71.2 percent of the gas sold to interstate pipeline companies in 1968 in the Hugoton-Anadarko area (87.8 percent in the Panhandle-Hugoton Field and 55.9 percent in the Other Fields).[7] No producer or pipeline opposed the proposed settlement, although Cities Service Gas Company contended three rate schedules should not be included for reasons peculiar to those sales.

7. Opponents of the original settlement who did not oppose the amended settlement included the California Distributor Group, Los Angeles, San Francisco, and the Public Service Commission of Colorado.

Specific Objections to the Settlement Proposal

8. Chicago opposed the settlement proposal as lacking record support for the proposed rates. Denver-APGA made the same objection and urged additionally that it "would

5. Northern Natural Gas Company, Transwestern Pipeline Company, Colorado Interstate Gas Company, Cities Service Gas Company, Panhandle Eastern Pipe Line Company, Michigan Wisconsin Pipe Line Company and Natural Gas Pipeline Company of America. See Appendix C.

6. Central Natural Gas Company, Central Telephone & Utilities Corporation (formerly Western Power & Gas Company), Iowa Electric Light & Power Company, Iowa-Illinois Gas & Electric Company, Iowa Power and Light Company, Iowa Public Service Company, Metropolitan Utilities District of Omaha, Minneapolis Gas Company, Northern States Power Company (Minnesota), Northern States Power Company (Wisconsin) and Northwestern Public Service Company, all of which are Upper Midwest distributors.

7. These producers and their 1968 jurisdictional sales are listed in Appendix E.

grant the producers 1.2 to 3 cents per Mcf in excess of a just and reasonable rate", that the elimination of all refunds prior to 1961 and of thirty percent of the refunds for 1961 and 1962 was not justified, and that the provision for a one cent ceiling rate escalation July 1, 1972, would make the moratorium "anti-consumer."

9. California objected to the absence of specific quality standards from the settlement proposal (except for gas under contracts dated on or after November 1, 1969), the higher price allowed gathered gas, and said the settlement rates "do not appear to be capable of being justified in terms of costs incurred, including an allowance for a fair rate of return" (p. 12). California also objected to the failure to require full refunds and to "future price escalation . . . without regulatory scrutiny. . . ." California contended also that the Commission lacks authority to approve a settlement proposal when opposition is filed to it, but must instead decide the case upon the merits.

10. In its *Permian* decision,[8] the Supreme Court stated:

> ". . . . Area regulation of producer prices is avowedly still experimental in its terms and uncertain in its ultimate consequences; it is entirely possible that the Commission may later find that its area rate structure for the Permian Basin requires significant modification."
>
> * * *
>
> "We assume that the Commission will continue to examine both the premises of its regulatory methods and the consequences for the industry's future of its rate-making orders."
>
> * * *

8. 390 U.S. 747 (1968).

"We do not suggest that the Commission need not continuously evaluate the revenue and other consequences of its area rate structures. A principal advantage of area rate regulation is that it centers attention upon the industry's aggregate problems, and we may expect that, as the Commission's experience with area rate regulation lengthens, it will treat these important questions more precisely and efficaciously."

* * *

"The Commission cannot confine its inquiries either to the computation of costs of service or to conjectures about the prospective responses of the capital market; it is instead obliged at each step of its regulatory process to assess the broad requirements of the broad public interests entrusted to its protection by Congress. Accordingly, the 'end result' of the Commission's orders must be measured as much by the success with which they protect those interests as by the effectiveness with which they 'maintain . . . credit and . . . attract capital.'"

* * *

". . . we see no objection to [the Commission's] use of a varity of regulatory methods. Provided only that they do not together produce arbitrary or unreasonable consequences, the Commission may employ any 'formula or combination of formulas' it wishes, and is free 'to make the pragmatic adjustments which may be called for by particular circumstances.'"

* * *

11. In *Southern Louisiana Area Rate Cases*, ... F.2d ....., the Court of Appeals for the Fifth Circuit stressed the need for the Commission to review its cost computations in the light of demand, supply and the effect of the prices established. The Court of Appeals also dealt with the

settlement offer rejected by the Commission in Southern Louisiana, and Commissioner Carver's dissent advocating the adoption of that settlement proposal as being within the "zone of reasonableness":

> "In light of the imprecision of costs, broad support for the settlement, evidence that the market has at least a procompetitive structure, and cumbersome nature of price regulation, it may be that the settlement arguments advanced by Commissioner Carver are persuasive. In this case, the settlement is championed by the producers, and before the Commission it was supported by gas distributors (whom we classify as representing consumer interests) accounting for over 87 percent of delivery volume . . . . Widespread use of the settlement technique would result in negotiation pitting market forces against each other on an aggregate scale, overseen by the Commission."

12. In *Michigan Consolidated Gas Company, et al. v. F.P.C.*, 283 F.2d 204 (CADC, 1960), cert. denied, 364 U.S. ....., where the Commission had refused to consider a proposed settlement because of objection by one of the principal parties, the court remanded the case and required the Commission to consider the proposed settlement on its merits. The court said:

> "Even assuming that under the Commission's rules Panhandle's rejection of the settlement rendered the proposal ineffective *as a settlement*, it could not, and we believe should not, have precluded the Commission from considering the proposal *on its merits*. Indeed, the proposal appears prima facie to have merit enough to have required the Commission at some stage of the proceeding to consider it on its own initiative as an alternative to total abandonment.

* * *

"Of course, there may be valid objections to the settlement proposal which the Commission has not explained, or which a hearing upon the proposal would reveal. Such considerations may merit modification or total rejection of the proposal. But we think that, since the Commission is charged with the duty of protecting the ultimate consumer from 'exploitation at the hands of natural gas companies,' Federal Power Commission v. Hope Natural Gas, 1944, 320 U.S. 591, 610, 64 S.Ct. 281, 88 L.Ed. 333, it cannot refuse *to consider* a proposal which appears, on its face at least, consistent with that duty." (p. 224)

13. The Commission not only has discretion to give full consideration to a proposed settlement but also a legal obligation to do so.[9]

14. A settlement proposal by virtually all of the area's producers, supported by the pipelines and the distributors conveying the greater part of the interstate gas from the area, commands attention. A resolution of the issues which so many parties are willing to accept reduces the possibility

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9. See also *Cities of Lexington, etc., Ky. v. F.P.C.*, 295 F.2d 109 (CA4, 1961), where the court upheld approval by this Commission of a settlement despite the objection of Lynchburg Gas Company. That company appealed, contending the Commission could not approve the settlement over its objection, but was compelled to decide the case on the merits. The court said:

"There is nothing in the Administrative Procedure Act which expressly requires unanimous consent of all the participating parties to an agreement of settlement; and to read such a contention into the statute in view of the countless state agencies, municipalities and consumers who may be interested in an administrative proceeding would effectually destroy the settlement provision. In this instance the kind of interest which Lynchburg entered the proceeding to represent was protected by the participation and consent of other parties in like situation. Their consent to the settlement was sufficient basis for the Commission's approval." (p. 121)

of future litigation. Of course the settlement proposal must be considered upon its merits, in the light of existing conditions, but this is quite different from California's insistence that we must ignore the settlement and take up the case on its merits as reflected in a voluminous record of raw evidence.

The Rate Structure

15. The initial decision and the settlement proposal provide one set of base area rates for gas from the Hugoton-Panhandle Field and a separate set of higher area base rates for gas from the Other Fields. The settlement proposal provides for a higher area base rate for gas-well gas under contracts executed on or after November 1, 1969. On the merits, we approve these principles.

16. The settlement proposal provides for the same treatment for casinghead gas in the Hugoton-Anadarko area as that provided in Permian and Southern Louisiana, namely pricing it the same as gas well gas of the first vintage. However, a proviso is inserted that if our earlier determination to this effect in *Southern Louisiana* should be modified, equivalent treatment would be expected. This qualification is reasonable and appropriate for adoption here.

Date of Division

17. In the *Southern Louisiana Area Rate Proceeding,* the Commission said:

> ". . . The use of the same division date as was used in the Permian Basin will ensure equality of treatment in this respect among producers operating in different pricing areas—a producer should not be penalized by having a later division date exclude its gas from the new gas category solely because he chanced to be in one area rather than another, unless strong and suffi-

cient reasons are shown for the different treatment. Multiplicity of division dates throughout the various areas would complicate the administrative structure of gas prices." *Southern Louisiana Area Rate Proceeding*, 40 FPC 530, 555 (1968), modified in other respects and confirmed, 41 FPC 301, rehearing denied 41 FPC 616 (1969), affirmed .....F. 2d .....(CA5, 1970).

The quoted reasoning applies with equal force here, and in the absence of the amended settlement proposal we would establish October 1, 1968, as the date of division between earlier and later vintages of gas in this proceeding. The settlement proposal's use of November 1, 1969, as the date of division, makes contracts executed in the 13-month interim from October 1, 1968, through November 1, 1969, subject to a base area rate 1.5 cents per Mcf lower than if the date of division were October 1, 1968. An examination of the contracts filed with the Commission and the estimated annual volumes moving thereunder indicates that by our approving the later division date provided in the amended settlement proposal there will be a saving to consumers of approximately seven million dollars during the period of the moratorium provided in the settlement proposal.

The Wellhead Prices of Other Field Gas Under Contract Before November 1, 1969

18. In the initial decision detailed computations were made of the nationwide cost of new gas and of the historical cost of Other Field gas in the Hugoton-Anadarko area. The two computations gave approximately the same result. The initial decision therefore established one basic price for all Other Field gas, varied only by the tax differences in the different states: 16.3 cents in Kansas, 17.1 cents in Okla-

24. We do not reach our determination, however, upon a consideration of costs alone. The proposed later vintage prices are approved also as a means of encouraging exploration for and development of additional supplies of gas.

25. The central location of this area makes the discovery and development of its gas particularly desirable. Many of the largest pipelines are largely dependent upon the Hugoton-Anadarko area for major portions of their gas supplies. Gas which is made available in this area can be delivered to major markets with a minimum of delay. To major midwest cities it is vital, and to other widely divergent parts of the country it is scarcely less important. The prices proposed may not solve the gas supply problem, but it is reasonable to expect that prices proposed by the industry itself will assist in moderating supply difficulties. The rate stability here provided will be beneficial to all segments of the industry and to consumers as well.

The Wellhead Prices for Hugoton-Panhandle Field Gas

26. A direct computation of the historic cost of Hugoton-Panhandle Field gas-well gas cannot be derived from the evidence of record in this proceeding. It is possible to determine, however, that Hugoton-Panhandle Field gas is less costly than Other Field gas-well gas.

27. Despite the apparently lower costs, the evidence on the development of this field discloses that expensive well replacement programs have become necessary in recent years. The delivery pressure, originally at 440 psig, has been declining over the years and the necessity for compressor installation is becoming more common. Salt water disposal has become an increasing problem in recent years and has contributed to increasing costs.

28. The adoption of the proposed settlement rates will encourage the continuation of these programs and prolong the economic life of the field, which is the largest single accumulation of gas in this country, and the backbone of supply from the Hugoton-Anadarko area. We have previously accepted a 12.5 cents per Mcf rate in the Kansas portion of this field under individual company settlements—the same rate as now proposed. For these reasons, we find the proposed settlement prices for Hugoton-Panhandle gas to be just and reasonable, and in the public interest.

Proposed Price Escalation of January 1, 1972

29. The proposed settlement provides that all area rates will be increased by one cent per Mcf on January 1, 1972. We find that this escalation is justified by the increased rate of return which we find should be allowed all vintages of gas.

30. Changes in the economic climate—evidenced, for example, by persistent inflationary trends in the general economy and unusual liquidity pressures on corporate enterprises—have made it apparent that the 12 percent rate of return found adequate by the Commission in 1965 (*Permian*) and 1968 (*Southern Louisiana*) should be adjusted upward. Compared with prime rates of 6 percent to 6¾ percent charged by commercial banks during 1968, the prime rate was raised to 8½ percent in June 1969 and has been at 8 percent since March 1970. Bond interest rates have experienced similar and at times much sharper increases as a result of continued heavy demands for long-term financing.

31. Accordingly, we find that the proposed escalation in rates is just and reasonable in view of the increased rate of return which should be allowed producers from 1969 on-

24. We do not reach our determination, however, upon a consideration of costs alone. The proposed later vintage prices are approved also as a means of encouraging exploration for and development of additional supplies of gas.

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31. Accordingly, we find that the proposed escalation in rates is just and reasonable in view of the increased rate of return which should be allowed producers from 1969 on-

wards. The delay of the escalation to July 1, 1972, under the settlement proposal is a provision favorable to consumers.

32. So far as gas under contracts dated on or after November 1, 1969, is concerned we also find that the proposed one cent price escalation is necessary and proper to provide additional incentives to find and commit to interstate commerce the particularly valuable gas from this vital supply area.

Substantial Off-Lease Gathering

33. The settlement proposal would provide for a one-cent gathering charge to be added to the wellhead price for Other Field gas that has had substantial gathering by the producer off the lease, a two cents gathering charge for Hugoton-Panhandle Field gas prior to July 1, 1973, and 2.5 cents thereafter. This compares with the Examiner's one-cent gathering allowance for Other Field gas in Texas, 1.1 cent for other field gas in Kansas and Oklahoma, and 1.9 cent for Hugoton-Panhandle gas in all three states.

34. The principal objection to this was advanced by California. California contends that there should be no allowance for gathering at all, arguing that gathering is primarily for the purpose of processing the gas to obtain its liquids, and gathering costs should be ascribed to the liquids rather than to the residue gas.

35. In *Permian* we accepted California's view, but the circumstances were different. In the Permian Basin, two-thirds of the gas produced was casinghead gas, collected to be stripped of its liquids before the residue gas was sold. Gas-well gas in that area was of high pressure: gathering it was not necessary for compression. The principal costs of the gathering systems were attributable to casinghead gas, and therefore were not properly included in gas-well gas costs.

36. In *Southern Louisiana*, we recogaized that the cost of such gathering of gas should be included in computing the producers' cost of gas-well gas, which predominated.

37. Gas-well gas also predominates in the Hugoton-Anadarko area. The situation resembles that in *Southern Louisiana* and we find that additional compensation for substantial off-lease gathering is proper since the amount of gathering allowance in the settlement proposal closely approximates the Examiner's determinations. The increase in gathering allowance for Hugoton-Panhandle gas in 1972 is just and reasonable because of the declining pressure in the Hugoton-Panhandle Field, which will increase the cost of gathering and compressing. The increased price will also be an incentive to continued production after the wellhead pressure in the field has been reduced.

38. To the settlement proposal were attached, as Exhibits A-1 and A-2, lists of deliveries nominated for the gathering allowance. We are unable to determine the fact with respect to all these deliveries from the information before us in our files, and with respect to other deliveries which may qualify for the gathering allowance even though they were not included in the lists. Information to establish the pertinent qualifying facts must be furnished either before or at the time of filing the applicable rate schedules, or amendments thereto, in compliance with our present Order if the gathering allowance is to be applicable. In those instances where deliveries were nominated for the gathering allowance, or are hereafter nominated, that portion of any rate or charge attributable to such gathering allowance, and made effective pursuant to the Order herein, shall be charged and collected subject to refund pending the Commission's determination whether such gathering allowance is, in fact, applicable.

wards. The delay of the escalation to July 1, 1972, under the settlement proposal is a provision favorable to consumers.

32. So far as gas under contracts dated on or after November 1, 1969, is concerned we also find that the proposed one cent price escalation is necessary and proper to provide additional incentives to find and commit to interstate commerce the particularly valuable gas from this vital supply area.

Substantial Off-Lease Gathering

33. The settlement proposal would provide for a one-cent gathering charge to be added to the wellhead price for Other Field gas that has had substantial gathering by the producer off the lease, a two cents gathering charge for Hugoton-Panhandle Field gas prior to July 1, 1972, and 2.5 cents thereafter. This compares with the Examiner's one-cent gathering allowance for Other Field gas in Texas, 1.1 cent for other field gas in Kansas and Oklahoma, and 1.9 cent for Hugoton-Panhandle gas in all three states.

34. The principal objection to this was advanced by California. California contends that there should be no allowance for gathering at all, arguing that gathering is primarily for the purpose of processing the gas to obtain its liquids, and gathering costs should be ascribed to the liquids rather than to the residue gas.

35. In *Permian* we accepted California's view, but the circumstances were different. In the Permian Basin, two-thirds of the gas produced was casinghead gas, collected to be stripped of its liquids before the residue gas was sold. Gas-well gas in that area was of high pressure; gathering it was not necessary for compression. The principal costs of the gathering systems were attributable to casinghead gas, and therefore were not properly included in gas-well gas costs.

36. In *Southern Louisiana,* we recognized that the cost of such gathering of gas should be included in computing the producers' cost of gas-well gas, which predominated.

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38. To the settlement proposal were attached, as Exhibits A-1 and A-2, lists of deliveries nominated for the gathering allowance. We are unable to determine the facts with respect to all these deliveries from the information before us in our files, and with respect to other deliveries which may qualify for the gathering allowance even though they were not included in the lists. Information to establish the pertinent qualifying facts must be furnished either before or at the time of filing the applicable rate schedules, or amendments thereto, in compliance with our present Order if the gathering allowance is to be applicable. In those instances where deliveries were nominated for the gathering allowance, or are hereafter nominated, that portion of any rate or charge attributable to such gathering allowance, and made effective pursuant to the Order herein, shall be charged and collected, subject to refund pending the Commission's determination whether such gathering allowance is, in fact, applicable.

further considered. The effect of the settlement proposal with respect to dehydration, compression and removal of carbon dioxide, although favorable to the producers, is offset by the fact that the settlement proposal will cost the producers a loss of upward Btu adjustments.

Minimum Rates

46. Under the proposed minimum rates the gas involved will still be most favorably priced from the point of view of buyer and consumer. We find that the proposed minimum rates are not unreasonable, and that they are in the public interest. See *Permian, supra.*

Moratorium

47. The settlement provides for a moratorium on rate increases above the applicable area rates until July 1, 1977. A principal benefit of the settlement proposal is the extended period of relative certainty that it provides, creating an atmosphere of rate stability. While changed circumstances may compel the reopening of some of the matters here determined, we believe a settlement proposed by a large part of the industry and accepted by all of it is less liable to be subjected to constant pressure for change than would a Commission determination imposed without consent. We find that the moratorium provision of the settlement proposal is in the public interest.

Refunds

48. The settlement proposal departs from the pattern of previous decided cases by providing for a lesser refund obligation than that which would follow from a strict application of theory. Collections subject to refund and in excess

of the proposed settlement rates agreed upon for contracts in effect prior to 1961 would not be required to be refunded. Seventy percent of such amounts collected in 1961 and 1962 would be refundable, and 100 percent of the amounts collected after 1962.[11] This provision reflects the peculiar situation of Phillips Petroleum Company.

49. After the Supreme Court's decision in the *First Phillips* case, the Commission reinstated its proceedings and instituted separate investigations of the rates of a number of other major producers. The Commission's decision of September 28, 1960, in the remanded *Phillips* proceeding determined that individual company regulation was not feasible and that producer regulation should be accomplished on an area basis, 24 FPC 437, 547. The Commission also found that, based on a 1954 test year, Phillips' costs were $10,000,000 in excess of its revenues, 24 FPC 537, 576. While expressing the view that Phillips costs probably exceeded its revenues at least through 1958, and that a great many of its unconsolidated Section 4(e) proceedings should be terminated, the Commission terminated only the consolidated 4(e) proceedings, except two involving spiral escalation clauses.

50. At the same time that it issued its *Phillips* decision the Commission issued its Statement of General Policy No. 61-1, establishing guideline prices for various pricing areas, and shortly thereafter instituted the Permian area rate proceeding.

51. While the Permian Basin Proceedings were pending, the Commission embarked on an individual company-wide

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11. The total refunds required for the period ending December 31, 1969, would be approximately 47 million dollars. The excess amounts collected, and not required to be refunded, would total about 5 million dollars.

settlement program which ultimately resulted in settlement by most of the major gas producers. The rates agreed upon in these settlements were generally consistent with those established by the Statement of General Policy No. 61-1, while the refunds were determined by reference to a cost of service study of the company involved with refunds required of amounts collected in excess of the settlement rates for periods after unit costs equalled unit revenues. As a result of such studies, full refunds were not required except in one instance.[12]

52. Following approval of a number of such major producer settlements, the Commission announced in *Jack W. Grigsby (Operator), et al.*, 32 FPC 529 (1964), that it would extend its settlement program to small producers without recourse to cost data for the computation of refunds, but that 25 percent refunds would be required through 1960, 70 percent for 1961 and 1962 and 100 percent thereafter.

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12. Tidewater Oil Co.

Refunds were not required by the following companies prior to the dates shown:

Amerada	July 1, 1960
Atlantic	December 1, 1961
Cities Service Production Co.	July 1, 1960
Gulf	December 1, 1961
Humble	May 1, 1961
Pan American	July 1, 1962
Mobil	December 1, 1962 (except for two rate schedules for which additional refunds were made from 4/1/60 to 12/1/16)
Shell	January 1, 1961
Sohio	September 1, 1961
Sun	January 1, 1961
Texaco	January 1, 1961
Texas Gulf	July 1, 1961

53. Subsequent to the issuance of *Grigsby,* settlements were approved with respect to other major producers which provided for no refunds to be made prior to January 1, 1961 (Sun), December 1, 1961 (Atlantic), and February 1, 1962 (Pan American).

54. Phillips Petroleum Company did not enter into a company-wide settlement, apparently, because Phillips has extensive gathering facilities in the area and the Commission's Statement of General Policy did not contemplate any addition to guideline rates for such activities. *H. F. Sears, et al.,* 31 FPC 585 (1964). Since the proposed settlement and our determinations recognize the validity of gathering charges in this area, and since Phillips did not enter into a settlement agreement, the major share of potential refunds during the years 1960 and 1963, approximating 80 percent of the total, are the responsibility of Phillips.

55. We find the proposed refund provisions to be in the public interest and fair under the foregoing circumstances.

Small Producers

56. The precedents of *Permian* and *Southern Louisiana* are followed, and there is no disagreement by anyone with the settlement proposal in this regard. We agree that this is proper and so find.

Approval of Settlement Proposal

57. Having examined each provision of the proposed settlement upon its merits, we find that the proposal as a whole is in the public interest, and should be made the order of this Commission. It is fair to the consuming public, and will promote certainty and stability and reduce administrative burdens by reduction of contested issues. Adoption of the proposal will contribute to obtaining additional supplies of gas from this crucial area, and contribute to co-

operation in the attempt to deal with the problems of gas supply. For all these reasons, the settlement proposal should be adopted.

Supply and Demand

58. In determining area rates we have been charged by the Court of Appeals for the Fifth Circuit with predicting the probable demand for gas, determining the desired level of supply and attempting to determine a price which will elicit that level of supply. *Southern Louisiana Area Rate Cases, supra.* The court noted that this task was difficult, but said it must nevertheless be attempted by the Commission.

59. All major sources of energy in the United States are currently in short supply. Brown-outs have already occurred in some electric utility distribution areas. Restrictions on gas use have been imposed by distributors in a number of areas and are being considered in others. The stock-pile reserves of coal for electric utilities are below the level considered by the industry to be a safe operating margin. The installation of nuclear power plants has progressed more slowly than was forecast and it now appears that nuclear power will not be able to ease the increasing demand on fossil fuel for many years. Domestic oil reserves are declining. Low-sulphur coal and oil are in short supply. Desulphurization facilities are lagging behind projected demand to meet stringent air pollution standards, destined to grow more stringent in several major urban areas. Pipelines are unable to obtain the desired supplies of natural gas. In 1968, according to the statistics of the AGA, the national findings of natural gas fell below production. This occurred again to a greater degree in 1969, when only about 8.3 trillion cubic feet were added to reserves while production mounted to 20.6 trillion.

60. The actual growth in demand for gas as reported by the Future Requirements Committee (FRC)[13] in September 1969, was 4.2% in 1965, 6.9% in 1966, 6.5% in 1967, and 9.1% in 1968. In September 1969, FRC estimated the growth rate for 1969 as 7.4%, for 1970 as 6.1% and for 1971 as 5.3%. For the 1970-75 period the average annual growth rate was estimated at 4.3% compounded annually; from 1975 to 1980 at 2.8%, from 1980 to 1985 at 2.9% and from 1985 to 1990 at 3.1%. These growth rates were based upon a survey of distributors throughout the country conducted by the FRC. Each distributor was asked to make projections from its own areas based on anticipated population growth and trends in demand based on experience. FRC then compiled all the various predictions to produce its estimates for the future. To obtain production necessary to meet these projected increases would mean that the 20.6 trillion cubic feet production of 1969 would have to increase to about 21.9 trillion in 1970, 23.1 trillion in 1971, and 27.0 trillion in 1975.

61. The FRC figures have customarily been on the conservative side.[14] Virtually all predictions as to energy consumption in the past few years have proven swiftly to be gross underestimates. The Commission Staff Report on National Gas Supply and Demand (September 1969) indicates an average annual growth in demand of about six percent (compounded) since 1964. When projected into the

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13. The Committee consists of 26 members drawn from pipelines (11), distributors (6), producers (4), government (5), plus two *ex officio* members from the University of Denver.

14. It has been noted that the FRC's compilation is based upon data furnished by local distributors. The predictions of local distributors as to expected demands upon them have proved in recent years to be not only too low but very much too low. Independent and industry surveys, and the witnesses who have testified in area rate cases as to the probable demand for gas have unanimously under-estimated the growth in demand, some by 200 percent. The predictions of demand for coal and oil have also been proven to be far short of the reality.

future this average annual growth would result in substantially higher demands than those projected by FRC.

62. The largest single year's addition to natural gas reserves in the United States took place in 1956 when it reached 24.7 trillion cubic feet.[15] This was also a year of the great activity in domestic oil exploration and development in part engendered by disruption of the supply of foreign oil. In no later year have total reserve additions exceeded 21.1 trillion cubic feet, the level in 1965 and 1967. We may fairly predict then that the production of natural gas which reached 20.6 trillion cubic feet in 1969 will shortly reach a level above that of any past year's additions to reserves. With declining gas reserves and an increasing disparity between demand and available supply, we are confronted with the unpleasant prospect that consumption of natural gas must be curtailed or end use controls imposed unless additional sources of supply can be found or alternative sources of energy developed to meet demand. There is little prospect that alternative energy sources will reduce the demand for gas in the next decade.

63. The evidence shows that the demand for gas has risen beyond all expectations of a few years ago and that it will rise within a few years to a level that will strain or even exceed the capacity of the industry to meet. This will not mean that those presently using gas will find none available. It does mean that some of those who want to begin to use gas will not be able to do so and that some of those who want to sell gas will not be able to get all they want for all their customers. Incremental supplies will be limited.

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15. While reserve additions are extremely inaccurate as a measure of findings in any given year, this maximum figure is almost certainly not too high. In general, statistics as to findings must be averaged over several years to offset the inaccuracies in particular years.

64. The situation in the Hugoton-Anadarko area is tied closely to that of the nation as a whole. This area is centrally located. While the greater part of its gas flows northeasterly to the Upper Midwest it could also be used to supply both the East Coast and the Far West. Pipelines which would normally obtain gas from this area have been compelled to go further afield to the Permian Basin, Southern Louisiana, the Texas Gulf Coast and Other Southwest Areas. The demand upon the Hugoton-Anadarko Area may fairly be considered in terms of the national demand although, if anything, the proportionate demand upon this area would exceed that of the nation as a whole. As the Hugoton-Panhandle Field depletes, new Other Fields must replace it if the flow of gas is to continue at present levels.

65. There is no direct evidence in this proceeding as to what relationship a particular price might have to new gas supplies. Since price is one of the important factors bearing on supply, it is reasonable, therefore, to anticipate greater supplies of gas from an increased level of rates.

New Rate Schedule, Rate Change and Quality Statement

66. In this proceeding the Commission provides for a new and simplified filing procedure. In the past, a producer whose rate was in excess of the applicable area rate was required to make one filing setting forth the reduced rate and a separate filing of a quality statement. In the current area rate proceeding we have provided for a single filing in place of the two formerly required. The form set forth as Appendix D will satisfy the requirements of both compliance filing and the quality statement filing, thus simplifying the administrative process and reducing the volume of paper work of producers and of this Commission. It is our intention that the use of this simplified combined statement will be extended to other areas.

COMPARISON OF PROPOSED SETTLEMENT WELLHEAD RATES WITH INITIAL DECISION, GUIDELINE AND IN-LINE RATES

(All rates at cents per thousand cubic feet at 14.65 psia)

	Proposed Settlement			Initial Decision		Guideline[1]		In-line[2]
	Contracts Before — November 1, 1969 —		Gas-Well Contracts on or after Nov. 1, 1969 (All Fields)	Hugoton-Panhandle Field Contracts before 1961	Other Fields and Hugoton-Panhandle Field Gas-Well Contracts after 1960	Increase for Contracts before Sept. 28, 1960	Initial Price, Temporary Certificates	
	Hugoton-Panhandle Field	Other Fields						
Kansas	12.50¢	17.50¢	19.00¢	11.3¢	16.3¢	11.0¢	16.0¢	—
Oklahoma-Panhandle	13.25	18.50	20.00	11.9	17.1	11.0	17.0	17.0
Oklahoma-Anadarko (except Carter-Knox Field	13.25	18.50	20.00	11.9	17.1	11.0	15.0	15.0
Carter-Knox Field	13.25	18.50	20.00	11.9	17.1	11.0	16.8	—
Texas	13.50	19.00	20.50	12.1	17.50	11.0	17.0	—

1. Guideline rates were established by Statement of General Policy, No. 61-1, September 28, 1960. The Commission there stated that increases in rates up to 11 cents per Mcf would not be suspended. Higher increases would be suspended and thereafter collected subject to refund if the area rates were found to be lower. Temporary certificates would issue at the various rates specified for particular areas or sub-areas, subject to refund if later found to exceed the in-line rates. Guidelines were not ceilings, however; any producer might file for any higher rate permitted by its contract subject to refund if the area rate was found to be lower.

2. In-line prices are the initial rates at which permanent certificates are issued, determined after a hearing. They are not subject to refund unless the Commission so provides in a particular case. *F.P.C. v. Sunray DX Oil Co., et al.*, 391 U.S. 9, 24 (1968). They are not ceilings; after the suspension period any producer may file for any higher rate permitted by its contract, subject to refund (down to the in-line rate) if the area rate is found to be lower. In-line prices are established only for contracts of the particular years for which a determination is made in a given case (for example, 1959-1963 in the Oklahoma-Anadarko sub-area; see *Edwin L. Cox, et al.*, 32 FPC 1301 (1964)).

FURTHER FINDINGS AND ORDER

Upon consideration of the entire record in this proceeding, which includes public notice, public hearing with opportunity for the submission of oral and documentary evidence, for cross-examination and for the submission of rebuttal evidence, initial decision by an examiner, exceptions thereto, and oral argument before the Commission, *the Commission further finds:*

(1) Each of the respondents[16] listed in Appendix A to this decision is, and at the time of all past sales with which we are here concerned was, a "natural-gas company" within the meaning of the Natural Gas Act and is engaged in the sale of natural gas in interstate commerce for resale for ultimate public consumption subject to the jurisdiction of this Commission.

(2) Past, present and proposed sales of natural gas to which the order herein applies are subject to the jurisdiction of this Commission.

(3) Rates for all sales of natural gas, subject to the jurisdiction of the Commission by the producers in the Hugoton-Anadarko area that are above the applicable area rates prescribed herein, have not been shown to be just and reasonable or otherwise lawful under the provisions of the Natural Gas Act and should be disallowed, and refunds should be required as hereafter provided.

(4) The just and reasonable rates for past, present and proposed sales of natural gas to which this order applies are the applicable area rates set forth in ordering paragraph (A) below.

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16. Where the term "respondents" is used in the finding and ordering paragraphs hereinafter set forth, it is to be regarded as referring to all named respondents in the Commission orders issued in this case, and to all parties on whose behalf such named respondents have filed FPC gas rate schedules for sales of gas produced in the Hugoton-Anadarko area.

(5) Contracts providing for rates in excess of the applicable just and reasonable rates determined herein are in that respect unjust and unreasonable.

(6) It is necessary and appropriate to carry out the provisions of the Natural Gas Act that the Commission adopt the orders and regulations prescribed herein.

(7) Except as herein granted the exceptions to the initial decision and proposed order should be denied.

The Commission, acting pursuant to Sections 4, 5, and 16 of the Natural Gas Act (52 Stat. 822, as amended, 823, 830; 15 U.S.C. 717c, 717d, 717o) and Sections 553, 556 and 557 of the United States Code (the Administrative Procedure Act, 60 Stat. 238, 239, 241, 242, as codified September 6, 1966 by 80 Stat. 383, 384, 386, 387) *orders:*

(A) Part 154 of the Commission's Regulations Under the Natural Gas Act, Subchapter E, Chapter I, Title 18 of the Code of Federal Regulations (18 CFR 154) is amended by adding a new section 154.106 reading as follows:

Part 154—Rate Schedules and Tariffs

* * * * *

§154.106 Area rates—Hugoton-Anadarko area.

(a) From and after October 1, 1970, the effective date of Opinion No. 586, Docket No. AR64-1, *et al.*, ...FPC....., and prior to July 1, 1977, no rate or charge made, demanded or received under a rate schedule filed pursuant to this Part for gas produced in the Hugoton-Anadarko area shall exceed the applicable area rate prescribed by this section except in compliance with a specific order of the Commission.

(b) Applicable area rate means the base area rate established in paragraph (c) adjusted to the extent required by paragraphs (d), (e) and (f).

(c) *The Base Area Rates.* The following base area rates per Mcf (at 14.65 psia) are hereby established and

subject to the adjustments provided in paragraphs (d), (e) and (f):

(1) Gas sold under contracts dated prior to November 1, 1969:

(i) For all gas produced in the Panhandle and Hugoton Fields[17]:

(aa) Prior to July 1, 1972:

12.50 cents in Kansas
13.25 cents in Oklahoma
13.50 cents in Texas

(bb) On and after July 1, 1972:

13.50 cents in Kansas
14.25 cents in Oklahoma
14.50 cents in Texas

(ii) For all gas produced from fields or reservoirs other than the Panhandle and Hugoton Fields:

(aa) Prior to July 1, 1972:

17.50 cents in Kansas
18.50 cents in Oklahoma
19.00 cents in Texas

(bb) On or after July 1, 1972:

18.50 cents in Kansas
19.50 cents in Oklahoma
20.00 cents in Texas

(2) Gas sold under contracts dated on or after November 1, 1969.

(i) Gas well gas:

(aa) Prior to July 1, 1972:

19.0 cents in Kansas
20.0 cents in Oklahoma
20.5 cents in Texas

17. The Hugoton fields in Kansas, Oklahoma and Texas are limited to the producing zones of the Chase group in the Permian System. The Panhandle fields in Texas include the Panhandle Lime of the Wichita group, the Herrington zone of the Chase group, the Granite Wash formation of Permian and Pennsylvania Age, and the Red Cave formation overlying the Wichita group.

(bb) On or after July 1, 1972:

20.0 cents in Kansas
21.0 cents in Oklahoma
21.5 cents in Texas

(ii) Casinghead gas:[18]

(aa) Prior to July 1, 1972:

17.5 cents in Kansas
18.5 cents in Oklahoma
19.0 cents in Texas

(bb) On or after July 1, 1972:

18.5 cents in Kansas
19.5 cents in Oklahoma
20.0 cents in Texas

(d) *Quality Standards and Adjustments to the Base Area Rate.*

(1) For gas sold under contracts dated prior to November 1, 1969, quality standards and resulting adjustments to the base area rate shall be in accordance with the provisions of the particular contract with respect to contract rates.[19]

(2) For gas sold under contracts dated on or after November 1, 1969, quality standards and resulting adjustments to the base area rate shall be in accordance with the provisions of the particular contract with respect to contract rates, except:

18. In the event that it is determined by a final order, no longer subject to judicial review, that casinghead gas in the Southern Louisiana area shall receive the same ceiling price as gas-well gas of comparable vintage, the ceiling prices set out hereunder for gas-well gas produced in the Hugoton-Anadarko area and contracted for on or after November 1, 1969, shall apply to casinghead gas contracted for on or after November 1, 1969, prospectively from the date of such final order in the Southern Louisiana Area Rate Proceeding.

19. For those sales certificated by Opinion 390, 29 FPC 1175, there shall be a Btu adjustment proportionately upward and downward from 1,000 Btu, similar to that provided in (2) (iv) hereof.

(i) *Hydrogen Sulphide*—The gas shall contain not more than one grain of hydrogen sulphide per one hundred cubic feet of gas at 60° F and 14.73 psia (10 gr. per Mcf).

(ii) *Total Sulphur*—The gas shall contain not more than 20 grains of total sulphur per one hundred cubic feet of gas at 60° F and 14.73 psia (200 gr. per Mcf).

(iii) *Carbon Dioxide*—The gas shall contain not more than 3 percent by volume of carbon dioxide.

(iv) Btu Adjustment—For gas with more than 1,000 Btu's per cubic foot, at 60° F and 14.73 psia, upward adjustments shall be made on a proportional basis from a base of 1,000 Btu's. For gas with less than 1,000 Btu's per cubic foot, at 60° F and 14.73 psia, downward adjustments shall be made on a proportional basis from a base of 1,000 Btu's.

(e) *Adjustment for Substantial Off-Lease Gathering.* Where delivery of the gas is made after substantial off-lease gathering by the producer, whether at a plant tailgate or at a central point, the applicable area rate shall be adjusted upward above the base area rate:

(1) For gas produced in the Panhandle and Hugoton Fields:

(i) Prior to July 1, 1972, 2 cents per Mcf.

(ii) On or after July 1, 1972, 2.5 cents per Mcf.

(2) For gas produced from fields or reservoirs other than the Panhandle or Hugoton Fields, 1 cent per Mcf.

(3) In all instances where deliveries are nominated for the gathering allowance, or claim to the same is otherwise made, that portion of any rate or charge attributable to such gathering allowance, and made effective pursuant to the Order herein, shall be charged and collected subject to refund, with interest at 7 percent per annum, pending the Commission's determination, whether such gathering allowance is, in fact, applicable.

(f) *Adjustments for Tax Changes.* The applicable area rate shall be adjusted upward by 75 percent of the amount of any applicable new state or federal production, severance or similar taxes, effective subsequent to January 29, 1970, and shall be adjusted upward by 75 percent of the amount of any increase in existing state or federal production, severance or similar taxes, subsequent to January 29, 1970, and shall be adjusted downward by 75 percent of the amount of any decrease in existing state or federal production, severance or similar taxes subsequent to January 29, 1970.

(g) The Hugoton-Anadarko area consists of the State of Kansas, Texas Railroad Commission District No. 10, and the Oklahoma counties of Cimarron, Texas, Beaver, Harper, Woodward, Ellis, Woods, Alfalfa, Grant, Major, Garfield, Roger Mills, Dewey, Custer, Blaine, Kingfisher, Canadian, Beckham, Washita, Caddo, and Grady, and that part of Stephens County lying within Township 2 North, Range 4 and 5 West.

(h) Prior to July 1, 1977, any seller seeking to charge rates in excess of the applicable area rate or requesting a change in the applicable area rate must file a petition for waiver or amendment of this section pursuant to Section 1.7(b) of the Commission's Rules of Practice and Procedure (18 CFR 1.7(b)) fully justifying the relief sought in the light of this opinion and order. Prior to July 1, 1977, the seller may not file any rate increase in excess of the applicable area rate herein prescribed unless and until the Commission grants the petition.

(B) *Minimum Rates*

(1) Minimum rates per Mcf for natural gas produced in the Hugoton-Anadarko area are hereby established (at 14.65 psia) as follows:

10.0 cents in Kansas
10.5 cents in Oklahoma
10.75 cents in Texas.

For sales made after substantial off-lease gathering by the producer, or at a plant tailgate, the applicable minimum rate shall be adjusted upward by adding the applicable amount of adjustment provided for substantial off-lease gathering.

(2) All respondents making jurisdictional sales of gas produced within the Hugoton-Anadarko area are hereby authorized to apply for increases to the minimum rates provided in subparagraph (f) hereof. Increases to the established minimum rate will be granted notwithstanding contractual provisions to the contrary which are hereby modified *pro tanto*.

(C) Section 157.40 of the Commission's Regulations under the Natural Gas Act, Subchapter E, Chapter I, Title 18 of the Code of Federal Regulations (18 CFR 157.40) is amended by revising paragraph (d) to read as follows:

§ 157.40 Small producer certificates of public convenience and necessity.

* * * * * *

(d) *Availability to small producers operating in the Southern Louisiana and Hugoton-Anadarko areas.* Small Producer Certificates are also available to Small Producers operating in the Southern Louisiana or Hugoton-Anadarko areas with respect to their small producer sales in those areas. Small Producer Certificates will authorize sales at prices no higher than the applicable area rates specified for the Southern Louisiana area in § 154.105 and specified for the Hugoton-Anadarko area in § 154.106. Applications for Small Producer Certificates in either or both areas shall contain the information required in subparagraphs (2), (3) and (4) of § 157.40(b).

(D) The applicable area rate as defined in ordering paragraph (A) above, shall be effective from and after

October 1, 1970, and any amounts collected in excess thereof on or after that date shall be subject to refund plus interest at 7 percent. In addition, with respect to the rates involved in the Section 4(e) proceedings set out in Appendix A, the applicable area rate as defined in paragraph (A) above, shall be effective from the date such Section 4(e) rates were collected subject to refund and all amounts collected under those Section 4(e) rates prior to the effective date of this Opinion in excess of the applicable area rate shall be subject to refund, plus interest at the rate specified in the respective Section 4(e) proceeding, in accordance with the provisions of ordering paragraphs (F) and (G) herein: provided, however, that with respect to such 4(e) dockets no refunds are required below the rate allowed in a final, unconditioned permanent certificate previously granted for such sale, no refunds are required of amounts collected prior to January 1, 1960, and only 70 percent of amounts collected in excess of the applicable rate in 1961 and 1962 is required to be refunded.

(E) On or before November 2, 1970, each respondent shall file a supplement to each applicable rate schedule, effective as of October 1, 1970, reflecting any reductions required to bring any or all of its rates into conformity with the applicable base area rate established by ordering paragraph (A) herein. The timely filing of a completed statement in conformity with Appendix D hereto shall constitute compliance with this paragraph (E).

(F)(1) Each person having on file with this Commission a rate schedule with regard to gas produced or sold within the Hugoton-Anadarko area, or hereafter filing such a rate schedule (including a contract or amendment adding acreage or new reserves) shall, with regard to such rate schedule or amendment, file on or before November 2, 1970,

or within 90 days from the date of first delivery under the rate schedule or amendment, whichever is later, a statement in conformity with Appendix D hereto. All statements herein required shall be signed by both the seller and the purchaser. If the seller and the purchaser are unable to agree upon any or all of the particulars entering into the computation of the applicable area rate, the seller shall file the statement herein required which shall indicate the absence of agreement and supply the information required to compute the applicable area rate as well as the contentions of the parties with respect to the quality and amount of the adjustment for any item in dispute. The purchaser may file a separate statement setting forth its views within the period herein provided.

(2) The statement filed hereunder which reflects full agreement between seller and purchaser shall be deemed accepted by the Commission unless the Commission, within 120 days after such filing, shall otherwise order. In the event of disagreement between the seller and purchaser or, where the Commission otherwise determines that the statement filed is inconsistent with the provisions of ordering paragraph (A) herein, the Commission will after appropriate proceedings, prescribe the applicable area rate to be applied as of October 1, 1970.

(3) Any respondent will be exempt from filing the statement required by subparagraph (1) hereof for any sales which are "small producer sales" as defined in Section 157.40 with respect to sales in the Hugoton-Anadarko area in accordance with Section 157.40(d) prescribed herein if a producer seeks to qualify thereunder. If the Commission subsequently finds that such a producer does not qualify as a small producer such applicant shall be required to file the statement required by subparagraph (1) hereof within 90 days after any such Commission finding.

(G) *Refund Reports.* On or before November 2, 1970, a refund report shall be filed with this Commission in triplicate, and one copy served on the buyer, by each respondent involved in one or more of the Section 4(e) proceedings set out in Appendix A to this decision and as to which refunds are required under the terms of this decision. Within 20 days from the filing of the refund report the buyer shall file its written concurrence or disagreement with such report. The report shall set forth the following information (if more than one rate schedule is involved the respondent shall supply the information for each schedule separately):

(i) The rate collected during the period subject to refund and the periods during which each rate was collected.

(ii) The volume of gas sold at each such rate.

(iii) The difference between the total amount collected during the period subject to refund and the amount that would have been collected at the applicable area rate as defined herein subject to the provisos of ordering paragraph (D).

(iv) The computation of the applicable area rate and the basis for any difference between it and the base area rate.

(v) The interest, at rates as specified in each Section 4(e) proceeding, on the above refundable excess revenues, subject to the limitation by Section 154.102(f) of the Commission's Regulations Under the Natural Gas Act. The interest shall be calculated to September 1, 1970.

(H) *Treatment of Refunds.* Each respondent shall retain the amounts shown in the report required under ordering paragraph (G) subject to further order of the Commission directing the disposition of those amounts. If a respondent elects to commingle these retained refunds with

its general assets and use them for its corporate purposes, it is authorized so to do after notice to the Commission; and it shall pay interest thereon at the rate of 8 percent per annum on all funds thus available from the effective date of this order to the date on which they are paid over to the person ultimately determined to be entitled thereto in a final order of the Commission. If a respondent elects to deposit the retained refunds in a special escrow account, the respondent shall make such deposit and shall tender for filing on or before the date of the filing of the refund report an executed Escrow Agreement, or a certificate attesting to the fact that it has executed such an agreement, in the form provided by Section 250.12 of Part 250 of the Regulations Under the Natural Gas Act (18 CFR Part 250).

(I) These proceedings shall remain open for such further action as may be necessary with respect to individual respondents and such other action as may be necessary in the premises.

(J) Except as herein granted the exceptions to the initial decision and proposed order are hereby denied.

(K) The effective date of this order is October 1, 1970.

(L) Twenty-five copies of any application for rehearing or petitions for reconsideration shall be filed with the Commission in addition to the copies served on the parties to this proceeding.

(M) The Secretary shall cause prompt publication of the findings and ordering paragraphs, together with notice of the availability of this entire Opinion, to be made in the Federal Register.

By the Commission.

(SEAL)

Kenneth F. Plumb,
Acting Secretary.

APPENDIX B

Excerpt from pages 10 and 11 of Opinion No. 565-A

THE REFUND

22. In our original opinion and order of August 6, 1969, we provided for a refund based on the in-line price of 20 cents for deliveries from the commencement of operations in the Rayne Field until October 1, 1968. For the period from this date until the time of payment the refund was to be based on the Southern Louisiana area rate of 18.5 cents per Mcf for 1959 vintage gas.

23. At the present time the question of a refund must be approached in the light of the present state of area price regulation in the Southern Louisiana area. On review of our *Southern Louisiana* area decision, Opinion No. 546 and order in AR61-2, the court indicated[3] that we had authority under Section 16 of the Natural Gas Act to stay, modify or rescind any part of our order, notwithstanding the court's affirmance, if circumstances made a change advisable. The court on rehearing confirmed our authority to reopen any part of the *Southern Louisiana* orders, including those affecting revenues from gas already delivered, and to make retrospective as well as prospective adjustments in the public interest. The court specifically said that the Commission might let its refund orders stand, or, if it found the refunds too burdensome, might remedy the situation by changing its orders.

24. The court refused to stay issuance of its mandate affirming our rate determinations in Opinion No. 546, and the judgment was issued as the mandate on July 14, 1970. However, as noted above, we have stayed any rate reductions or refunds required to be made in Opinion No. 546 and order.

---

3. *Southern Louisiana Area Rate Cases, supra.*

25. The result is that the just and reasonable rates applicable to the Southern Louisiana area in which the Rayne Field is situated have not been fully determined, nor has it been determined whether refunds should be made by the producers in that area either for the periods before or after October 1, 1968. In these circumstances it is our opinion that the public interest precludes our ordering refunds to be paid by the Rayne Field producers at this time. The myriad problems confronting the Commission in coping with producer regulation render our task difficult and complex, at best. However, the one objective that must always be kept in sight is the need to provide fair and equal treatment for all of those regulated. It is essential, therefore, that the four producers involved in this proceeding should be afforded the same treatment as will be given to all other producers in Southern Louisiana. In this regard, we believe that the just and reasonable rates which ultimately flow out of any settlement, or further proceedings in AR61-2, or AR69-1, should govern the level of payments in this case prior to October 1, 1968, as well as after that date. While we may find ultimately that refunds should be paid, we need not discuss here the contentions made by Continental with respect to the appropriateness of refunds or their computation (assuming a firm Southern Louisiana area rate).

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E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Nos. 669, 680, 681, 682, 683,
684, 685, 691 and 692

MUNICIPAL DISTRIBUTOR GROUP, ET AL., *Petitioners,*

v.

FEDERAL POWER COMMISSION, ET AL., *Respondents.*

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF IN OPPOSITION FOR RESPONDENT, PIPELINE PURCHASER GROUP

(Southern Natural Gas Company, Tennessee Gas Pipeline Company, Texas Gas Transmission Corporation, Texas Eastern Transmission Corporation, Transcontinental Gas Pipe Line Corporation, Trunkline Gas Company, United Fuel Gas Company, United Gas Pipe Line Company)

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October 14, 1970

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

Nos. 669, 680, 681, 682, 683,
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v.

FEDERAL POWER COMMISSION, ET AL., *Respondents.*

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF IN OPPOSITION FOR RESPONDENT PIPELINE PURCHASER GROUP

Respondent Pipeline Purchaser Group[1] opposes the petitions for writ of certiorari in the above-captioned nine causes, all of which relate to the judgment of

[1] The Pipeline Purchaser Group sought judicial review below but is solely a respondent here. The group consists of eight interstate pipeline purchasers, Southern Natural Gas Company, Tennessee Gas Pipeline Company, Texas Gas Transmission Corporation, Texas Eastern Transmission Corporation, Transcontinental Gas Pipe Line Corporation, Trunkline Gas Company, United Fuel Gas Company, and United Gas Pipe Line Company.

the United States Court of Appeals for the Fifth Circuit entered on March 19, 1970, because under present circumstances the petitions are premature.

OPINIONS BELOW

The opinion of the Court of Appeals dated March 19, 1970, and its opinion on petitions for rehearing dated June 16, 1970, are not yet reported but have been printed as appendices to Continental Oil Company's petition in No. 680, Appendix A, pages 1-70 and Appendix B, pages 1-3, respectively. The opinions and orders of the Federal Power Commission are reported at 40 FPC 530, and 41 FPC 301, respectively.

JURISDICTION

Petitioners have sought to invoke the jurisdiction of this Court under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

In light of the opinions and judgment below, and the active status of related proceedings being heard by the Federal Power Commission ("Commission") in Docket Nos. AR 69-1, *et al.*, the Pipeline Purchaser Group believes all petitions for writs of certiorari in this case to be premature. Therefore, in our view the question actually presented is:

> Whether it is premature for this Court to review at this time procedural and substantive matters raised by petitioners, since the court below preserved to the Commission the responsibility for determining, in the first instance, the manner in which the recently recognized shortage of natural gas should be treated in prescribing producer rates—an undertaking the Commission is vigorously pursuing in proceedings which have not yet been concluded.

STATEMENT OF THE CASE

Although the petitions adequately describe the general history of the case, they do not focus sharply upon the problem with which the court below, and even more directly the Commission, was confronted.

This proceeding, the second initiated by the Commission under its program to regulate the rates of independent producers of natural gas through area ratemaking, commenced in May, 1961. At that time, and throughout the evidentiary stages of this proceeding, natural gas supplies from the Southern Louisiana area were adequate to meet consumer requirements, although the margin of safety was progressively narrowing.

By the time the Commission issued its decision, Opinion No. 546, on September 25, 1968, the shortage had reached the point at which interstate pipeline purchasers were unable to purchase currently the supplies of gas needed to meet their growing market requirements. Accordingly, when Opinion No. 546 was issued, the Pipeline Purchaser Group filed with the Commission a motion requesting the opportunity to bring to its attention tangible facts as to the gas supply problem, certain in the knowledge that the situation would deteriorate sharply unless the Commission took remedial steps through modification of the recently issued rate order. (R. 398858). Other parties made similar requests.

Although the Commission did not then apprehend the extent to which the gas supply shortage had overtaken the industry, and so did not reopen the proceeding for evidence as to this critical problem, it sought to resolve the issue by initiating another area rate

proceeding for Southern Louisiana, on the same day it denied rehearing in the instant proceeding. The new area rate proceeding, Docket No. AR 69-1, has been moving forward on an accelerated basis throughout the period the instant matter has been under judicial review.

Also, the Commission did not make effective the rate levels provided in its order in the instant proceeding, nor require the payment of refunds based upon such rate levels. In part, this is the result of stay orders issued by the Commission and the court below, and in part it is attributable to the fact that the Commission has not deemed it timely to order such actions.

As the hearings in the new area rate proceeding were commencing, the Commission enlarged the subject matter, initially relating only to offshore regions of the Southern Louisiana area, so as to embrace the onshore regions as well. Thus, the Docket No. AR 69-1 proceeding applies to the entire Southern Louisiana area, and to all vintages of gas, as well as to the appropriate price level for future discoveries.

The Pipeline Purchaser Group, while actively participating in the Docket No. AR 69-1 proceedings, also petitioned for judicial review in the United States Court of Appeals for the Fifth Circuit, urging that the Commission be directed to relate its Southern Louisiana rate order to the eliciting of adequate gas supplies for consumer needs, in light of current conditions.

Without detailing the steps leading to the judgment of the Court of Appeals, it is sufficient for present purposes to note that the Commission ulti-

mately requested a remand, and the court below undertook to assure petitioners and other parties that the Commission would be free to take such action as it deemed necessary to counteract the gas supply shortage. The Commission is currently attempting to do so with active cooperation of almost all the parties, including those involved in this litigation.

As recognized by the court below, the members of the Pipeline Purchaser Group appear in the instant matter solely in their role of purchasers and transporters of Southern Louisiana gas, and their alignment results from the fact that "they are concerned that the price level will not elicit sufficient supply for their needs" (Continental Appendix A, page 2). This is true with respect to this Brief in Opposition as well.

We urge the Court to permit the Commission to proceed as rapidly as possible to resolve the entire pricing problem for the Southern Louisiana area so as to ameliorate what has become a critical gas shortage of nation-wide proportions. This objective can be attained most directly and expeditiously through denial of the petitions for writs of certiorari as prematurely brought.

ARGUMENT

I.

In Its Present Posture, Supreme Court Review of the Judgment Below Would Be Premature

The petitions for writs of certiorari variously seek to question (1) the ratemaking formulae applied by the Commission, some contending that the resultant rates were too low (Nos. 680, 681, 683, 684, 685), and another petitioner contending that they were too high (No. 692); or (2) the procedure employed by the court

below for the purpose of enabling the Commission to implement its rate order if it saw fit while preserving the Commission's authority to modify the order if needed (Nos. 669, 691). Petitioner in No. 692 seeks further review as to both aspects. Finally, the major producer group, Texaco, *et al.*, has conditionally cross-petitioned in No. 681, recognizing prematurity but seeking the right to raise substantive issues in the event certiorari should be granted as to other petitions.

In our view, because of the particular circumstances involved, this case in its present posture presents no issue which is ripe for review. Until the Commission takes further action, which would of necessity be subject to appellate review, no party can be finally affected by the judgment below. And, until the Commission acts, no party can foretell which issues, if any, will ultimately be relevant.

Thus, although it is understandable that parties wish to protect their future positions, or even to obtain judicial sanction for those positions, neither of these objectives calls for affirmative action by the Court at this time.

What is required, we submit, is that the Commission be permitted to take such action as *it* finds to be appropriate in meeting the natural gas shortage in this all-important producing region, and to do so as soon as physically possible. This is so clearly required—and so patently an administrative function—that judicial intervention at this point is neither necessary nor appropriate. It will be time enough to review the court's procedural determination as well as the Commission's substantive ratemaking formulae when an administrative order has been entered dealing comprehensively with all these matters.

As noted above, the Commission instituted a new area rate proceeding in Docket No. AR 69-1 on March 20, 1969, the same day that it denied rehearing in the instant cause. Although initially limited to more recent vintages of gas from the offshore region of Southern Louisiana, the scope of the proceeding was enlarged on December 15, 1969, to embrace *all* vintages of gas from *all* regions of Southern Louisiana.

That proceeding, which none of the petitioners has sought to abort, is presently in a very advanced evidentiary hearing stage and settlement negotiations are progressing concurrently. Since one of the principal objectives of the proceeding is to come to grips with the economic aspects of the current gas shortage, there is every reason to allow that proceeding to be concluded, and no substantial reason to destroy it through piecemeal review of various portions of its subject matter.

The petitions in Nos. 669, 691 and 692 set forth various allegations regarding the impact of the judgment below as to potential refunds, but the facts are that the Commission has never entered an order requiring the payment of refunds in this proceeding. Nor does the court's action in any way preclude ultimate refunds. Contrary to the views expressed in those petitions, the principal issue below related to the rate levels which should have been prescribed—but both the Commission and the Court of Appeals have been at pains to maintain maximum flexibility for the ultimate determination of those rate levels by the Commission.

Since there is no reason to believe that the Commission will shirk its responsibility, and on the con-

trary, there is every indication that it is seeking to arrive at a fair and efficacious solution to a very complex problem, it clearly should not now be hampered or foreclosed.

Finally, with regard to the procedural matters, it is not at all clear that the court's reference to the Commission's freedom to make "retrospective as well as prospective adjustments in this case" would sanction "reparations" or "retroactive ratemaking" as some petitioners suggest. In the first place, as explained above, the Commission's original rate order was never implemented, so this is not an instance of rates having been made effective and later changed, *nunc pro tunc*. Moreover, since the Commission has not taken definitive action in this regard, there is no basis for contending that it has acted unlawfully.

If, in fact, the consequence of the judgment below, or the Commission's action in pending proceedings, were to result in "reparations" or "retroactive ratemaking", the Pipeline Purchaser Group would urge that certiorari be granted and the decision of the court below summarily reversed with directions to remand to the Commission for full reconsideration in light of the critical gas shortage. But, in our opinion, nothing of this nature has occurred.

Thus, both as to the substantive aspects and the procedural questions, the petitions for writs of certiorari present no issue which must, or should be, resolved at this time. The entire subject matter should remain, or be placed, in the hands of the Commission for a definitive determination at the earliest possible time.

CONCLUSION

Wherefore, for the foregoing reasons, the Pipeline Purchaser Group requests that all petitioners for writs of certiorari in these proceedings be denied.

Respectfully submitted,

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October 14, 1970

SUPREME COURT, U. S.

Supreme Court, U.S.
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Nos. 669, 691, and 692

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 669

MUNICIPAL DISTRIBUTOR GROUP,
Petitioner,

v.

FEDERAL POWER COMMISSION, *et al.*,
Respondents.

No. 691

ASSOCIATED GAS DISTRIBUTORS,
Petitioners,

v.

AUSTRAL OIL COMPANY, *et al.*,
Respondents.

No. 692

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner,

v.

AMERADA HESS CORPORATION, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

MEMORANDUM FOR RESPONDENTS CONTINENTAL OIL COMPANY, *ET AL.*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 669

MUNICIPAL DISTRIBUTOR GROUP,
Petitioner,

v.

FEDERAL POWER COMMISSION, *et al.*,
Respondents.

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ASSOCIATED GAS DISTRIBUTORS,
Petitioners,

v.

AUSTRAL OIL COMPANY, *et al.*,
Respondents.

No. 692

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner,

v.

AMERADA HESS CORPORATION, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

MEMORANDUM FOR RESPONDENTS CONTINENTAL OIL COMPANY, *ET AL.*

Continental Oil Company and Mobil Oil Corporation (Continental, *et al.*), petitioners in No. 680, hereby re-

spond to the petitions in Nos. 669, 691 and 692 which also seek writs of certiorari to review the judgment and opinions entered by the United States Court of Appeals for the Fifth Circuit in this same case on March 19, 1970 and June 16, 1970. In response to these petitions, Continental, *et al.*, state:

1. In Nos. 669, 691, and 692, Texaco, Inc., *et al.*, are filing a brief opposing the petitions in Nos. 669, 691, and 692. Continental, *et al.*, do not oppose the petitions in Nos. 669, 691, and 692 on the grounds of prematurity set forth at pages 7-11 of the Brief for Texaco, *et al.*, but adopt the other grounds for opposing the petitions set forth at pages 12-19 of the Brief for Texaco, *et al.*

2. In the event the petitions in Nos. 669, 691, and 692 are granted, Continental, *et al.*, will not be aligned with the petitioners. In No. 680, Continental, *et al.*, have set forth the questions Continental, *et al.*, believe are presented by the opinions and judgment below, and our view that the Court of Appeals erred in refusing to reverse the Commission on the issues raised by Continental, *et al.*, and remand the case with express directions to the Federal Power Commission to rescind the opinions and orders on review. Therefore, in the event this Court considers the case on the merits, the position of Continental, *et al.*, will be that indicated by the petition in No. 680.

3. In the event the petitions in Nos. 669 and all related cases were granted, Continental, *et al.*, also would not oppose the request of Petitioner The California Company in the related case No. 682 that the case be "summarily remanded to the Court below with instructions to

direct the Commission to reopen the case and proceed to such orders as it deems in the public interest."

Respectfully submitted,

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October 14, 1970

SUPREME COURT, U. S.

Nos. 669, 650-655, 691, 692

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1970

SOUTHERN LOUISIANA AREA RATE CASES

MUNICIPAL DISTRIBUTORS GROUP, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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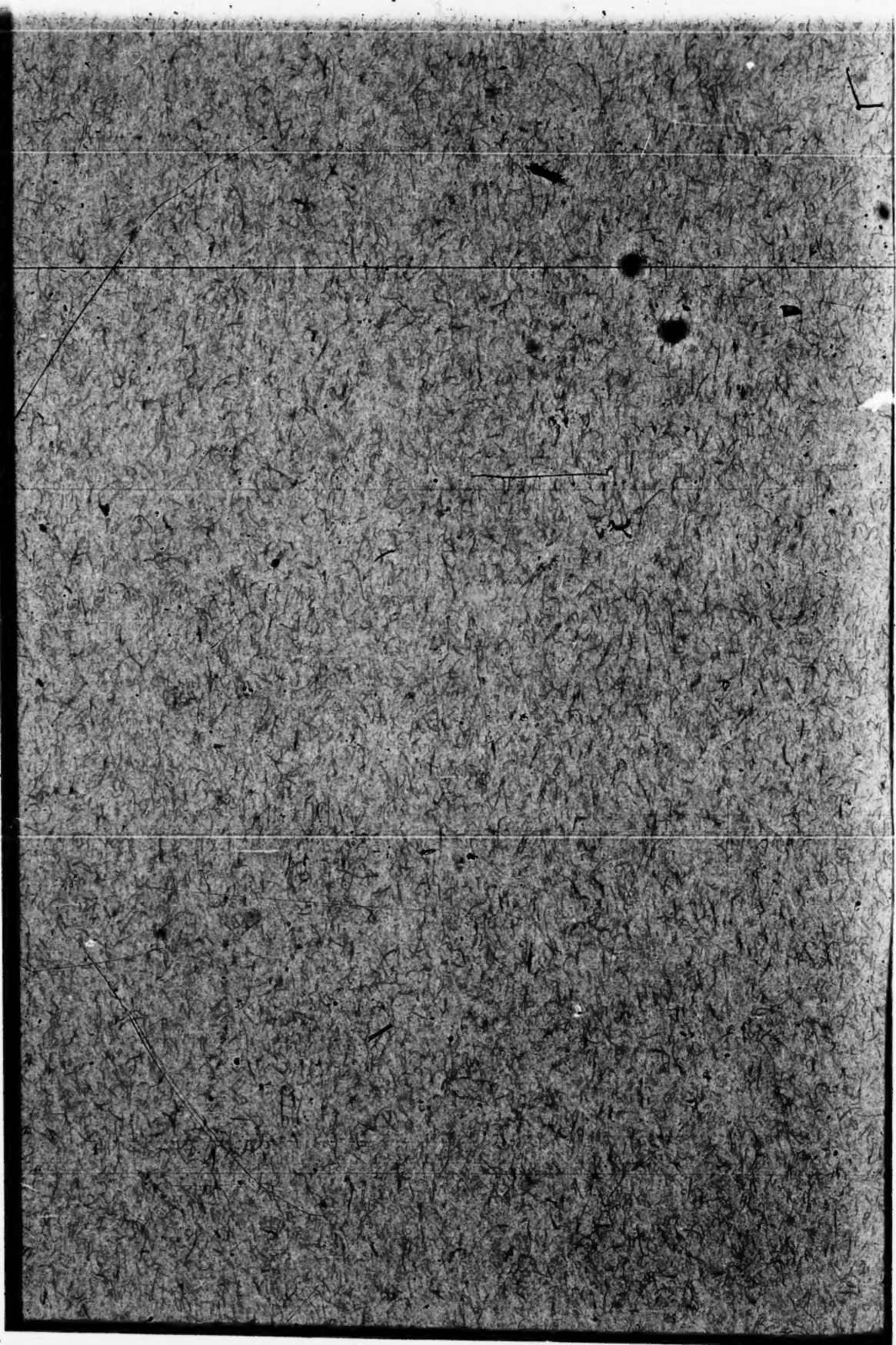

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In the Supreme Court of the United States

OCTOBER TERM, 1970

Nos. 669, 680-685, 691, 692

SOUTHERN LOUISIANA AREA RATE CASES

MUNICIPAL DISTRIBUTOR GROUP, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The initial opinion of the court of appeals (Cont. App. A, pp. 1–70)[1] is reported at 428 F. 2d 407. Its opinion on petitions for rehearing (Cont. App. B, pp. 1–3) is not yet reported. The opinions (No. 546) of the Federal Power Commission (Cont. App. D, pp. 1–258) are reported at 40 F.P.C. 530. The Commission's opinion (No. 546–A) on rehearing (Cont. App. E, pp. 1–112) is reported at 41 F.P.C. 301. (Opinions 546 and 546–A are hereinafter referred to as "*Southern Louisi-*

[1] "Cont." references are to the separate appendix to the petition filed by Continental Oil Company in No. 680.

ana I"). The decision of the Hearing Examiner (III J.A. 62d–447d) is reported at 40 F.P.C. 703.

JURISDICTION

The judgment of the court of appeals (Cont. App. C) was entered on March 19, 1970, and was clarified by opinion and order on timely petitions for rehearing on June 16, 1970 (Cont. App. B, pp. 1–3). The present petitions were filed on September 9 and 14, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether a reviewing court acting pursuant to Section 19(b) of the Natural Gas Act may affirm a Commission rate order with the condition that the Commission may modify that order if it determines, on the basis of new evidence appearing since the close of the initial Commission proceedings, that the public interest requires a modification.

STATEMENT

These petitions involve the Commission's second decision regulating producer rates on an area basis. The area here is Southern Louisiana, which is defined as that portion of the state lying south of the 31st parallel, including state and federal areas in the Gulf of Mexico off the Louisiana coast (Cont. App. D, p. 6), and which covers about 54,000 square miles with similar geological characteristics, almost equally divided between land and offshore waters (Cont. App.

D, p. 10). *Southern Louisiana I* was initiated in May, 1961 (25 F.P.C. 942). The Commission issued Opinion No. 546 on September 25, 1968, and Opinion No. 546–A on rehearing on March 20, 1969.

A. Background

The Commission assumed jurisdiction over the well-head sales of natural gas sixteen years ago pursuant to this Court's opinion in *Phillips Petroleum Co. v. Wisconsin,* 347 U.S. 672. For approximately six years, the Commission struggled to apply the theory of public utility regulation to an industry whose risks, investments, and operations could not be compared to a pipeline, an electric utility, or any other utility with facilities dedicated to the public use. The Commission's initial effort to regulate the price for each of the nearly 2,425 producers selling in interstate commerce in 1960 on a company-by-company cost basis brought the regulatory process to a standstill. Therefore, in 1960 the Commission announced proceedings to regulate producers on an area basis. Under this methodology, an individual producer's actual costs would be immaterial in determining his rates. Instead, a ceiling price per unit of gas would be allowed uniformly to all producers in an area. While the area rate proceedings were being developed, litigation and Commission policy statements established interim ceiling prices under which permanent certificates would be granted pending the outcome of the area rate cases;

these rates were called "in-line" and "guideline" rates.[2]

For five years the Commission struggled with its first area rate proceeding, finally issuing an opinion and order in 1965 establishing area rates for the Permian Basin. *Permian Basin Area Proceeding*, 34 F.P.C. 159, 1068, 1286. The Commission's regulatory procedures there were affirmed by this Court as being constitutionally permissible and not an abuse of the Commission's powers under the Natural Gas Act. *Permian Basin Area Rate Cases*, 390 U.S. 747. Emphasizing that "area regulation of producer prices is avowedly still experimental in its terms and uncertain in its ultimate consequences" (390 U.S. at 772), this Court recognized that the *Permian* case was "the first of many steps toward a more expeditious and effective system of regulation" (390 U.S. at 772, n. 37) and called upon the Commission to "continue to examine both the premises of its regulatory methods and the consequences for the industry's future of its rate-making orders" (390 U.S. at 816, n. 99).

Only five months after this Court's *Permian* decision, the Commission handed down its initial decision in *Southern Louisiana I*—the second area rate case—which had been pending before the Commission since 1961.

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[2] See *e.g.*, *Federal Power Commission* v. *Sunray DX Oil Co.*, 391 U.S. 9; *United Gas Improvement Co.* v. *Callery Properties*, 382 U.S. 223.

B. *Southern Louisiana I and Subsequent Commission Proceedings*

In *Southern Louisiana I*, the Commission adhered to the multiple-price system adopted in *Permian* in establishing rates for the sale of natural gas to interstate pipelines (Cont. App. D, pp. 20–22). Natural gas which is not produced in association with oil production and which is being produced under contracts dated prior to January 1, 1961 was denominated "flowing gas-well gas" (Cont. App. D, p. 28). Nonassociated gas produced under contracts dated subsequent to January 1, 1961 was termed "new gas-well gas" (Cont. App. D, p. 28). Generally, higher ceiling prices were permitted for the sale of new gas-well gas (Cont. App. D, p. 9). Gas produced in association with production of oil, or "casinghead gas," was given the same ceiling prices as flowing gas-well gas without regard to contract date (Cont. App. D, p. 9). The ceiling rates permitted for the sale of each were based primarily on costs (Cont. App. D, pp. 21–22).

The costs for flowing gas-well gas were developed in Southern Louisiana on an historical basis and primarily reflect expenditures for exploration and development in 1960, operating expenses in 1960, and investments which were made by producers through 1960 (Cont. App. D, pp. 85, 91, 248–49). Allocations were made by the Commission with respect to many costs and capital investments which producers incurred in the joint effort to discover and produce either oil or gas (Cont. App. D, pp. 88–93; 96–103).

A return at the rate of 12 percent was allowed on the industry-wide net book investment as of year-end 1960 (Cont. App. D, p. 104). Except for exploration and development expenditures, flowing gas costs were determined on an area basis per thousand cubic feet (Mcf) of gas produced (Cont. App. D, pp. 85, 249–50).

The cost of new gas-well gas was determined on a nationwide basis per Mcf of reserves added (Cont. App. D, p. 33). Unit costs were determined by taking the average annual expenditures for each component of cost and relating those expenditures to the average annual volume of non-associated gas reserves added or, in the case of operating expense, to the annual production volume (See Cont. App. D, pp. 31, 33). Unsuccessful exploration and development expenses, such as dry holes, were allocated between oil and gas; other allocations were also required between oil and gas (See Cont. App. D, pp. 36–37, 88–89). The applicable rate of return was applied to a rate base representing industry-wide investments spread over a 20-year recovery period and also taking into account an average lag of a year between the investment of funds in the search for gas reserves and the commencement of revenue from the sale of reserves discovered as a result of that search (Cont. App. D, p. 50). Natural gas liquids are usually found in conjunction with non-associated gas. Total finding and production costs for non-associated gas were reduced by the net market value per Mcf of such liquids (Cont. App. D, pp. 42–45). Although the Commission at the time of its 1968 decision recognized the

availability of later cost data, it did not actually employ such later data in the new gas cost calculations (Cont. App. D, pp. 36–40; 47–48). Instead, the costs were based primarily on data applicable to the period prior to 1961, although data as recent as 1966 were considered by the Commission (Cont. App. D, p. 39).

Having determined the costs involved, the Commission established three "vintages" of gas with separate ceiling prices for each (Cont. App. D, pp. 174–175). The first vintage included flowing gas-well gas and all casinghead gas; as to this the Commission fixed a maximum price of 17 cents per Mcf (Cont. App. D, pp. 175, 179).[3] New gas-well gas sold under contracts dated between January 1, 1961 and October 1, 1968 (second vintage) was given a ceiling price of 18 cents per Mcf (*Id.*). The third vintage was for new gas-well gas produced under contracts dated on or after October 1, 1968, on which an extra .5 cents would be allowed "to encourage continuation of necessary exploration and development activities and to recognize the greater uncertainties and possibilities of fluctuation [with respect to unit costs] to which the sellers are exposed" (Cont. App. D, p. 175). Accordingly, the ceiling price for third vintage gas was set at 18.5 cents (Cont. App. D, pp. 175–179).

An indefinite moratorium was also established prohibiting producers from filing for rate increases above the rates set "until such time as they may be changed by the Commission" (Cont. App. D, pp. 169–73).

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[3] As to each vintage, 1.5 cents per Mcf would be added to the ceiling price of gas subject to the Louisiana production tax.

Any amounts collected above the applicable area rates established in *Southern Louisiana I* after its effective date of October 1, 1968 were to be subject to refund. In addition, with respect to rates which had been collected prior to that date subject to refund under Section 4(e) of the Natural Gas Act, the applicable area rates were to be effective from the date such Section 4(e) rates were collected, with the difference to be refunded. No refunds were required, however, to the extent that the applicable area rates were below rates allowed by a final, unconditioned permanent certificate or a settlement. The amounts of the refunds and their disposition were made subject to further Commission order. (Cont. App. D, pp. 183–88; Cont. App. E, pp. 43–46.)

On March 20, 1969, some six months after its initial decision, the Commission modified its opinion by the issuance on rehearing of Opinion No. 546–A. The moratorium for the third vintage taxed gas was given a termination date of January 1, 1974 (Cont. App. E, pp. 7–8). Moreover, because of the Commission's concurrent decision to institute a new proceeding applicable to the offshore federal domain area, Docket No. AR69–1 (hereinafter "*Southern Louisiana II*"), the Commission determined to permit rate increase filings, subject to suspension and refund, up to 20 cents per Mcf for third vintage gas-well gas in the offshore federal domain (Cal. App. B, pp. 1–8).[4]

[4] "Cal." references are to the separate appendix to the petition filed by The California Company in No. 682.

During the pendency of the instant case before the Fifth Circuit, the Commission on December 15, 1969 expanded *Southern Louisiana II* to include all vintages of gas in Southern Louisiana, both on and offshore, and called upon the parties to provide evidence on "the adequacy of gas supply and adequacy of service to consumers, the demand for gas, the cause of a gas shortage, if any, the effect of price on gas supply and demand, and other relevant economic evidence, together with the current, nationwide cost of finding and producing non-associated gas" (Cal. App. B, pp. 9–15).

On July 17, 1970, the Commission initiated Docket No. R–389A in order to determine, nationwide, "the terms and conditions which will result in an adequate supply of natural gas for consumers at the lowest rate consistent with maintaining an industry structure capable of providing, and motivated to provide, service with its attendant risks." That proceeding encompasses Southern Louisiana but only as to gas produced under contracts dated subsequent to June 17, 1970. 35 Fed. Reg. 11638.

On July 30, 1970, the Commission initiated Docket No. R–394 in order to determine whether to lift the moratorium prohibiting rate increases in Southern Louisiana that had been imposed by *Southern Louisiana I* (Cal. App. B, pp. 39–43). That proceeding remains pending.

The rates set by the Commission in *Southern Louisiana I* have never been ordered into effect.

C. The Court of Appeals Decisions

Petitions to review the Commission's orders in *Southern Louisiana I* were filed in various courts of appeals by producers, pipeline companies, distributors and one state commission and were consolidated in the United States Court of Appeals for the Fifth Circuit. On March 19, 1970, the Fifth Circuit entered its first opinion. After recognizing that the purposes of the Natural Gas Act encompassed maintenance of adequate service for the consumer, the court pointed out that the Commission had declined to estimate either the overall demand for gas or the future supply which its order would elicit, and expressed concern that this was a violation of this Court's directive in *Permian* (Cont. App. A, pp. 46–50). The court nonetheless affirmed the Commission, noting that the Commission had initiated a new proceeding—*Southern Louisiana II*—to consider the possible inadequacy of its orders and was now aware of new information on the supply situation; the court stated that an evaluation of the supply situation and determination of the action needed were for the Commission and not a reviewing court, and that the Commission's orders were procedurally and substantively adequate in light of this Court's decision in *Permian* and the fact that the "experiment" doctrine of *Permian*—giving the Commission substantial leeway to develop procedures for establishing area rates—was still in effect (Cont. App. A, pp. 56–59). Accordingly, the orders of the Commission were "sustained in full" (Cont. App. A p. 69).

The court did, however, specifically identify improvements it felt the Commission should make in its handling of area rate proceedings. The Commission was called upon, for example, to identify and explain the rate components, to assess the character and number of individual producers that will remain after a rate order has had its effect, to assess the capital actually available to the industry as a whole and to assess the industry's probable conduct and performance as a result of an order. The court further called upon the Commission to make findings as to the market variables of supply and demand, and to set out the supply levels which its orders should elicit (Cont. App. A, pp. 61-68).

In view of these suggested improvements and in view of the Commission's knowledge of the impending natural gas supply crisis, the court acknowledged that the Commission might wish immediately to modify its *Southern Louisiana I* order despite the affirmance (Cont. App. A, p. 59) and cautioned that the affirmance should not be construed to interfere with such modification (Cont. App. A, p. 69).

Certain parties petitioned for rehearing, urging the court to remand the case for the taking of further evidence and to require further findings on the supply issue; they argued that the affirmance would preclude the Commission from modifying the rates for gas already delivered if necessary to deal with the supply problem. To assist in its consideration of those petitions, the court directed two specific questions to the Commission concerning (1) the Commission's au-

thority to stay, modify or rescind an order once that order had been "affirmed" and (2) a reviewing court's equitable powers to "affirm" while preserving Commission authority to "stay, modify or rescind" an order.

In response (Cal. App. B, pp. 51–54) the Commission stated: (1) that it would not have the authority to permit retroactive rate changes after affirmance, unless authorized to do so by the court at the time of the affirmance; and (2) that a reviewing court under Section 19(b) of the Natural Gas Act had

> * * * full statutory power to authorize or to instruct the Commission to (a) reconsider the record before it under standards set by the Court or (b) reopen the record for a specific purpose or purposes and to submit any modifications of the rate order to the same Court for further review in the light of the Court's standards, or both, without necessarily reversing the Commission and vacating the order for a new hearing.
>
> Any equitable powers which would transcend these statutory powers would be determined by this Honorable Court. (Cal. App. B, p. 53).

The Commission's response further requested the court of appeals to clarify whether it "intended to authorize this Commission to make retrospective adjustments, if it deemed appropriate, in the rates set in [*Southern Louisiana I*] *as of the effective date of the Commission* opinions (October, 1968) to the present or whether the court intended, by the use of the words 'sustained in full' * * * to restrict the

Commission to prospective changes from some future date when subsequent Commission orders, if any, are issued lifting the moratoria or establishing a new just and reasonable rate" (Cal. App. B, pp. 53–54). In addition, the Commission requested a remand of the case so that "the Commission can discharge its regulatory responsibilities consistent with the Court's opinion" (Cal. App. B, p. 54). Two of the five members of the Commission did not concur in the request for a remand, one of them stating that a remand "would create a climate which will inhibit a possible settlement in the pending [*Southern Louisiana II*] proceeding which was an outgrowth of the Commission's awareness that the gas supply situation was changing" (Cal. App. B, p. 55).

On June 16, 1970, the Fifth Circuit issued a *per curiam* order expressing its intention, pursuant to its equitable powers, to authorize the Commission to reopen all aspects of its order, including those affecting revenues from gas already delivered. Although emphasizing that its judgment was an affirmance and not a remand, the court left for the Commission's consideration what parts of the orders, if any, should be reopened in light of new evidence and stated that the Commission should have the power and the duty to review and revise its refund orders if this was in the public interest. (Cont. App. B, pp. 1–3).

Following the opinions of the court of appeals, the Commission further stayed any rate reduction pursuant to *Southern Louisiana I* until further order of the Commission (Cal. App. B, p. 31).

ARGUMENT

A.

The issues presented in the various petitions arise in the context of a potential crisis in the adequacy of supplies of natural gas for millions of consumers. Before turning to the specific issues raised by petitioners, it is necessary to understand the seriousness of the crisis and its interrelation with the area rates established by the Commission in *Southern Louisiana I*.

The Commission's staff projects on the basis of current trends, and subject to rebuttal, that by 1973 sufficient gas will not be produced to meet this country's demands unless new reserves are found at an accelerated pace. Although gas produced in Southern Louisiana accounts for approximately one-third of the total volume of gas currently being supplied across the nation,[5] directly affecting consumers in 28 central and eastern states (Cont. App. D, p. 12), Southern Louisiana has accounted for about 63 percent of the nation's total net increase in production since 1964. Production from that area, however, cannot continue to be increased at historical rates under present levels of reserve additions. Thus to a significant extent, it appears that the capacity to meet projected national demands for natural gas is dependent upon increased efforts to discover new reserves in Southern Louisiana (*Southern Louisiana II*, transcript pp. 1092–1121; 3938–4169). Accordingly, the Commission must estab-

[5] According to data filed with the Commission by interstate pipelines, the area accounted for 40 percent of the gas sold in the interstate market in 1969.

lish rate levels which provide the necessary capital and incentive to expand the exploration and development of additional reserves in this area.

Evidence concerning the present and future gas supply situation, which was ordered by the Commission on December 15, 1969 (*supra*, pp. 8–9), has been received by the Examiner in *Southern Louisiana II*, has been subjected to rebuttal and cross-examination and will be placed before the Commission within the near future. Since this evidence was not available except through allegation when the Commission decided *Southern Louisiana I*, the rates established by the Commission in that case, which have not yet become effective, necessarily were not based upon a consideration of such evidence. The refunding of approximately $375,000,000 by producers without adequate regard for (1) the effect the rates would have on the adequacy of supply to meet consumer needs, (2) the effect the refunds would have on the ability of producers to provide the capital for exploration and development programs, and (3) the effect on the number of competitors in the search for natural gas, would not be in the public interest. It must be determined whether all or part of the capital represented by the refund dollars is required for exploration and development before any refund levels are finally determined and ordered. If the Commission were limited to prospective changes of rates in Southern Louisiana, there would be no assurance that immediate capital needs, to the extent they are found to exist, could be fulfilled, since rates for future sales can generate capital only gradually over a period of years.

B.

While it is thus of great practical importance to the public that the Commission be authorized to conduct further proceedings in *Southern Louisiana I*, the legal issue raised by the distributor petitions (Nos. 669 and 691) and the petition of the New York Public Service Commission (No. 692) as to whether the court of appeals acted within its power in authorizing the Commission to conduct such further proceedings is not difficult to resolve. As an analysis of the unanimous decision below and Section 19(b) of the Natural Gas Act demonstrates, the court clearly acted within its powers and there is accordingly no occasion for plenary review of the issue by this Court. The remaining issues presented by the above and other petitions are not substantial and are premature.

1. It is misleading to contend, as do the distributors and the New York Public Service Commission, that the Commission has been granted the power to change rates retroactively. The Commission, of course, has no power to change finally approved rates retroactively and claims none. But where a reviewing court acting pursuant to Section 19(b) of the Natural Gas Act authorizes the Commission to conduct further proceedings with respect to certain rates, those rates are not final and may be revised by the Commission.

The court of appeals, in its initial opinion of March 19, 1970, criticized the Commission for failing, in setting rates for Southern Louisiana, to give adequate consideration to the future natural gas needs of the public. Recognizing that the Commission was undertaking a comprehensive review of the adequacy

of future gas supplies in *Southern Louisiana II*, during which review the Commission might discover that the rates set in *Southern Louisiana I* were inadequate, the court affirmed. The affirmance was qualified, however, and the court cautioned that the opinion should not be interpreted "to interfere with Commission action that would change the rates we have approved here" (Cont. App. A, p. 69). Whatever lack of clarity this qualified affirmance might have had was cured by the court's June 16 opinion on rehearing. The court there expressly relied on its equitable powers and its broad remedial powers under Section 19(b) to authorize the Commission to reopen any part of its orders in *Southern Louisiana I* (Cont. App. B, p. 2), subject, of course, to further judicial review.

In our view, the court acted within the scope of the authority granted to it under Section 19(b) of the Natural Gas Act. That section permits a reviewing court "to affirm, modify or set aside [an] order in whole or in part" and to "order * * * additional evidence to be taken before the Commission." That this provision contains a broad grant of equitable powers has been recognized. *Natural Gas Pipeline Company* v. *Federal Power Commission*, 128 F. 2d 481 (C.A. 7); see also *Ford Motor Co.* v. *National Labor Relations Board*, 305 U.S. 364, 374; *Dolcin Corp.* v. *Federal Trade Commission*, 219 F. 2d 742 (C.A.D.C.), certiorari denied, 348 U.S. 981.

2. The remaining issues raised by the petitions are concerned with specific elements of the methodology adopted by the Commission for the determination of just and reasonable rates for Southern Louisiana. While the court of appeals was critical of certain aspects of the Commission's methodology, it recognized that the regulatory "experiment" referred to by this Court in *Permian* was still in progress and that the Commission should be given latitude to develop and improve criteria for determining rates (Cont. App. A, p. 56–59). The court of appeals was clearly correct in upholding the Commission on these issues and no matters warranting review by this Court are thus presented.

Finally, consideration of these issues by the Court at this time would be premature and would delay the holding of further proceedings before the Commission.[6] Upon completion of those proceedings, any remaining regulatory issues could be presented to the courts.

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[6] Uncertainty caused by the petitions for writs of certiorari may well inhibit the Commission from expediting its regulatory process in this and related cases to establish stability in rate levels in Southern Louisiana. Only after stable rates are established, at levels which take into account the potential demand for natural gas and the need to discover sources of supply to meet the demand, will the public be protected against the possibility of a critical natural gas shortage. Under present circumstances, there is no assurance that sufficient capital will be available for immediate exploration needs. The Department of the Interior, for example, has given notice that offshore federal lands off Western Louisiana may be made available for lease in the immediate future. 35 Fed. Reg. 8699. Large commitments cannot be expected in the face of uncertain rate levels and uncertain cash refund requirements. Data available to the Commission indicate that these leaseholds are likely to contain large reserves of natural gas.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted.

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REPLY BRIEF OF PETITIONER TO BRIEFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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I

The Federal Power Commission argues (FPC Br. in Opp., pp. 14-15) that unless it is authorized to revise retroactively (presumably upward) the just and reasonable rates affirmed by the court below (which would deprive the consumers of the refund of $375,000,000, representing excessive charges unlawfully exacted by the producers), the producers may not have the ability to provide the capital for exploration and development to alleviate "a potential crisis in the adequacy of sup-

plies of natural gas for millions of consumers"[1] (FPC Br. in Opp., pp. 14-15).

There is not a shred of evidence to support the Commission's argument, and the Commission cites none. The refunds of $375 million are a "drop in the bucket" to producers who annually spend some $4 to $5 billion[2] on exploration and development and have enormous cash resources.[3]

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[1] Assuming, *arguendo*, that there is a shortage of natural gas, it is important that the Court not be misled as to its nature. The "shortage" does not affect existing commitments to consumers. There is no "shortage" to meet such existing commitments. The "shortage" refers to new increments of gas (see *Charting The Regulatory Course*, Remarks of John N. Nassikas, Chairman, Federal Power Commission, before New England Gas Association, March 19, 1970, p. 2), to meet an unexpected and explosive recent demand for natural gas, primarily industrial, as a result of air pollution and other environmental considerations. The demand for natural gas has been aggravated by the shortage of other fuels such as low sulphur oil and coal that are suitable for environmental purposes. The "shortage" assumes all demands should be served by natural gas, disregarding the question of the economically wasteful use of natural gas and efficient allocation of the Nation's energy resources, including natural gas, in the Nation's best interest. Any number of reasons may account for the "shortage" which has no relationship to the rate orders affirmed by the court below and the Commission's regulatory policies in general (see Municipal Distribution Group's Br. in Opp. in Nos. 680, et al., pp. 17-20).

[2] Commission Staff Exhibit 11, Schedule 27, FPC Docket No. AR69-1.

[3] Published financial data show enormous cash and equivalent reserves for the major producers. For example: Amerada Petroleum Corp., $148,000,000; Atlantic Richfield Co., $215,000,000; Cities Service Co., $113,000,000; Continental Oil Co., $268,000,000; Getty Oil Company, $106,000,000; Gulf Oil Corporation, $553,000,000; Mobil Oil Corporation, $728,000,000; Occidental Petroleum Corp., $288,000,000; Phillips Petroleum Co., $187,00,000; Shell Oil Company, $288,000,000; Standard Oil Company of New Jersey, $1,276,000,000; Superior Oil Co., $438,000,000; and Texaco Inc., $401,000,000.

The Commission's arguments to this Court are at odds with its representations to the court below where it said (FPC Br., CA 5, Nos. 27492, et al., pp. 20-21, 25, 26, 27, 28, 29):

> . . . the only price fixed by the Commission that can have any substantial effect on the development of *new* supplies is the price for gas-well gas not yet found and committed to the interstate market, that is, the third-vintage price for future sales of gas-well gas. . . .
>
> * * * * *
>
> The producers' argument that in order to alleviate the alleged gas shortage the Commission should fix the prices for all gas (including oil-well gas) above pre-existing prices totally ignores the fact, as found by the Commission and the courts in *Permian* and the Commission here, that the only prices fixed by the Commission that can have any substantial effect in the development of *new* supplies is the price for gas-well gas not yet found and committed to the interstate market.
>
> . . . the producers have simply disregarded the basic economic basis for the multiple-price system adopted in *Permian* . . . .
>
> * * * *
>
> The producers attempt (e.g., Amerada Br. pp. 19, 24) to avoid the impact of this economic reality on the ground that any reductions and refunds ordered will allegedly impair the search for additional gas supplies because the producers' source of funds for reinvestment would be less than if there were no reductions or refunds. As the Commission stated in denying rehearing (R 309077), this claim, which is based on the invalid premise the producers must internally generate all investment funds, is essentially the same contention in favor of a single price for all gas previously made and rejected in *Permian*. . . . The Commission properly

concluded (R 309077) that, assuming the rate set for future dedications is adequate, the industry will have no difficulty in finding the funds required to do the task.

Even assuming the premise that revenues for current exploration and development must be internally generated by sales of *gas* —not even from company funds generally, this would not justify maintaining the excess rates now being charged unless the rates set by the Commission for all gas, viewed together, were inadequate to generate a substantial cash flow. For the prices allowed by the Commission for first and second vintage gas provide plentiful revenues for investment in the search for new gas-well gas wells. . . .

Moreover, while producers repeatedly assert that the Commission's order will reduce revenues by $70 million annually, the fact is that because of the increase in sales volumes the total revenues generated by Southern Louisiana sales for 1969 *at the rates prescribed by the Commission* should be from about $22 million to $36 million greater than the actual revenues generated for 1968. . . .

Equally important, revenues from other company sources can and will be invested in the search for gas if the price is right. Moreover, in the past newcomers have put money into exploration and development and debt capital has also been used by producers.

Plainly, so long as the price for new gas is high enough to compete with alternative uses of available funds and so long as the gas market continues to grow, one may confidently expect necessary funds to continue to flow to new gas exploration and development. If the price for new gas were not high enough, there would be no basis for assuming that extra allowances for flowing gas would be invested in new gas rather than other activities.

> The foregoing makes it apparent that the allegations that the Commission prices are insufficient to bring forth adequate gas supplies, even if shown to be valid, would only warrant changing the price for future gas supplies. This is the very question the Commission is studying in the new offshore proceeding it has commenced, during which producers will be allowed to charge, subject to refund, one and one-half cents *above* the third-vintage price (which is already 2 cents above the calculated current cost).
>
> Far from demonstrating the invalidity of the present decision, the new proceeding constitutes the proper manner in which to consider possible revisions of the established rates. . . . (italics the Commission's; footnotes omitted)

The Commission now mistakenly assumes that if the refunds were forgiven, the producers necessarily would use the money to explore and develop natural gas reserves. But the irrefutable fact is that the producers have had unrestricted use of these refund dollars in their corporate affairs; yet, there is "a potential crisis in the adequacy of supplies of natural gas" (FPC Br. in Opp., p. 14). By their own admission, the producers have directed such funds where the expectation of profits is greatest.

It is difficult to escape the conclusion that the Commission has attempted to use the "shortage" to distract attention from, and preclude consideration of, the merits of the questions presented by petitioner in its petition for a writ of certiorari.

II

It is clear that the Commission's argument that the general equitable powers of the court support the order

below is misplaced. The Natural Gas Act permits a reviewing court only "to affirm, modify or set aside" the order before it for review. Any equity powers possessed by the court are ancillary to such authority, not in substitution for it. Neither the court below, nor the Commission, nor any of the respondents cite any precedent to support their arguments. We know of none. Although the court below expressed concern over what it characterized as "new evidence of a possible impending gas supply shortage" which had emerged after the closing of the record by the Commission in Southern Louisiana I, it nevertheless rejected proposals by the Commission and some producers that the matter be remanded for the taking of further evidence. After careful consideration it entered a judgment affirming the order and dissolving the stay of the Commission order which it had previously ordered. The court, *after* referring to its equitable powers as authorizing the Commission to make "retrospective as well as prospective adjustments", emphasized that "our judgment is an affirmance and not a remand" (Pet. App. B, p. 2) and the judgment entered by the court leaves no doubt respecting the unqualified and unconditional nature of the affirmance (Pet. App. E, p. 1).

In an effort to make it appear that the ruling of the court below respecting its equitable powers was within the scope of Section 19(b), the Commission quotes (FPC Br. in Opp., p. 17) Section 19(b) as providing that the reviewing court may order additional evidence to be taken before the Commission. The quotation omits essential language and is misleading. The omitted language discloses that such additional evidence may be ordered only "(i)f any party shall apply to the court for leave to adduce additional evidence,

and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission." (Pet. App. C, pp. 4-5) Such evidence, moreover, is to be adduced in advance of court review.

The Commission omits to inform this Court that motions to adduce were filed in the court below by the producers and pipeline companies and were denied, *sub silentio*, by the court below. No order to take additional evidence was entered. Review proceeded and upon review, the Commission's orders were affirmed without any directions to the Commission to take further evidence.

It is ironic to have the Commission rely on *Natural Gas Pipeline Company* v. *Federal Power Commission*, 128 F. 2d 481 (CA 7, 1942) as supporting the ruling of the court below. In that case the construction of Section 19(b) as conferring equitable powers was announced in the context of "the duty of a court of equity to exercise jurisdiction to enforce restitution, and, so far as possible, to correct what has been wrongfully done." (128 F. 2d at 486). Here the Commission and court below would reverse that salutary principle and reward the wrongdoers.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment of the court below on the questions presented should be reversed without further briefs or argument, since the decision of the court below on these questions is so clearly contrary to, and in con-

flict with, the Natural Gas Act and decisions of this Court and circuit courts of appeals.

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v.

FEDERAL POWER COMMISSION, ET AL.

REPLY OF MUNICIPAL DISTRIBUTOR GROUP, PETITIONER IN NO. 669, TO SUPPLEMENTAL STATEMENTS

The so-called "Settlement Proposal" filed with the Federal Power Commission on November 6, 1970, by the United Distribution Companies,[1] which admitted

[1] A number of the distributors comprising the United Distribution Companies are members of natural gas pipeline systems having a stake in higher prices for natural gas production by reason of their important ownership of, and pecuniary interest in, natural gas production properties.

[2] See Supplemental Statement in No. 691 at page 2 and the Commission's Supplemental Memorandum at page 2.

is not supported by all parties to the Southern Louisiana Area Rate Proceedings and has not yet been considered by the Commission, emphasizes, rather than diminishes, the importance of the petition for a writ of certiorari of the Municipal Distributor Group and the necessity for an immediate decision by this Court of the questions presented by that petition, if the primary aim of the Natural Gas Act—protection of gas consumers from exploitation at the hands of natural gas producers and natural gas pipeline companies—is to be realized. *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 610.

The "Settlement Proposal" would, if approved by the Commission, retroactively revise the just and reasonable rates prescribed by the Commission in Opinions and Orders No. 546 and 546A, which were affirmed by the court below, and would deprive consumers of the refund of $375 million of charges found by the Commission to be excessive. Supporting the United Distribution Companies' motion for promulgation of the settlement proposal, the Staff of the Commission has just represented to the Commission:

> . . . The resolution of all issues in the Southern Louisiana area necessarily required consideration of Docket Nos. AR 61-2, *et. al.* Although the Commission has already issued orders in those proceedings, *the Court of Appeals for the Fifth Circuit has given the Commission authority to reopen any part of its orders that circumstances require be reopened.* (Italics supplied)

And the Commission itself in its Supplemental Memorandum filed in this Court admits (p. 3) that "some of the issues raised here also underly the proposed

settlement", thus putting to rest once and for all the suggestion of prematurity contained in briefs in opposition to the petition for a writ of certiorari of the Municipal Distributor Group.

Moreover, contrary to the contentions of petition in No. 691 (Supp. Statement, p. 2) and of the Commission (Supp. Memo., p. 3), the grant of the Municipal Distributor Group's petition will not impede resolution of producer rate issues. Rather, instability and uncertainty will remain for years if the questions presented by the petition of the Municipal Distributor Group are not decided at this time. For upon approval of the "Settlement Proposal" by the Commission, questions respecting the validity of the retroactive revision of the rates, and denial of refunds to consumers, inherent in the "Settlement Proposal," will be submitted to a United States court of appeals for an appropriate Circuit for review and, thereafter, either on petitions of producers or consumers, will be back before this Court after a delay of a year or more, during which time instability and uncertainty will prevail.

If the petition of the Municipal Distributor Group were premature before, which it was not, it is not premature now, and uncertainty and delay can only be avoided by decision on the questions presented by the petition at this time.

WHEREFORE, for each and all reasons previously stated, the petition of Municipal Distributors Group for a writ of certiorari and its prayer for summary

reversal of the court below on the questions presented in the petition should be granted.

Respectfully submitted,

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Nos. 669, 680-685, 691, 692

In the Supreme Court of the United States,

OCTOBER TERM, 1970

SOUTHERN LOUISIANA AREA RATE CASES

MUNICIPAL DISTRIBUTOR GROUP, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL POWER COMMISSION

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SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL POWER COMMISSION

We file this supplemental memorandum to point out the following events which have occurred since the filing of the Commission's Brief in Opposition to the petitions for writs of certiorari in these cases:

1. On November 6, 1970, the United Distribution Companies [1] filed a proposed resolution on the merits

[1] The United Distribution Companies group consists of 32 distribution utilities serving more than ten million customers in twelve midwestern and eastern states. This group represents over 25 percent of the gas distribution operations in the United States.

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of *Southern Louisiana I* and *II* with the Commission. The proposed resolution was developed at settlement conferences ordered by the presiding examiner in *Southern Louisiana II* (Tr. 1081) and open to all parties to the proceedings. The Commission has given notice of the proposal to all parties to *Southern Louisiana I* and *II* and has directed that any response to the proposal be filed with the Commission by December 11, 1970. The Commission has not yet considered the settlement proposal on the merits and cannot do so until all parties have had an opportunity to be heard.

To date, a substantial number of the parties in the instant cases, as well as the Commission's staff in its role as representative of the public interest, have filed answers in support of the proposed settlement. These supporters include most members of the Associated Gas Distributors,[1] all interstate pipelines purchasing interstate gas in the Southern Louisiana area and producers accounting for more than 70 percent of the interstate sales from that area. Only the New York Public Service Commission, the Municipal Distributor Group,[2] a few members of the Associated Gas Distributors and several producers have not indicated a willingness to support the proposal. They will, following any filing of objections with the Commission, have

[1] The Associated Gas Distributors group consists of gas distribution utilities along the eastern seaboard and its members supply over 11 percent of the gas distributed in the United States.

[2] The Municipal Distributor Group represents a group of distribution utilities supplying less than 2 percent of the gas distributed in the United States.

an opportunity to present evidence in opposition to the proposed resolution on the merits.

2. The Department of the Interior has announced, as anticipated (Commission's Brief in Opposition, p. 18, n. 6), that an oil and gas lease sale for Offshore Louisiana will take place on December 15, 1970 (35 Fed. Reg. 16417).

In view of these developments and the fact that several of the petitions filed in these cases have now been conditionally withdrawn,[1] we respectfully submit that the remaining petitions for writs of certiorari should be expeditiously denied; since some of the issues raised here also underlie the proposed settlement,[2] any deferral of this Court's consideration would impede the further proceedings before the Commission.

ERWIN N. GRISWOLD,
Solicitor General.

GORDON GOOCH,
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Federal Power Commission.

NOVEMBER 1970.

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[1] We are informed that, as of the date of this filing, only the Municipal Distributor Group (No. 689), the Continental Oil Company and the Mobil Oil Company (petitioners in No. 690), Bradco Properties, Inc. et al. (petitioners in No. 683), the City of Norwich (one of the petitioners in No. 691) and the New York Public Service Commission (No. 692) still desire that their respective petitions for writs of certiorari be granted.

[2] In this regard, it should be noted that the question referred to in the Reply of the New York Public Service Commission in No. 692, pp. 2–7, of where the responsibility lies for the natural gas shortage which the Commission's staff has found to exist is at issue in *Southern Louisiana II*. All parties have had an opportunity to present evidence on that issue during the proceedings before the Commission in that case.

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